Supreme Court, U.S.
F I L E D
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NO. 85-1094

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

ALWIN E. HOPFMANN, GREGORY HESSION, CLARENCE PERKINS, CLARENCE PAULIN and BETH SULLIVAN,

Appellants,

v.

MICHAEL JOSEPH CONNOLLY, FRANCIS X. BELLOTTI, CHESTER G. ATKINS and THE DEMOCRATIC STATE COMMITTEE OF MASSACHUSETTS

Appellees.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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# MOTION OF APPELLEES CHESTER G. ATKINS AND THE DEMOCRATIC STATE COMMITTEE OF MASSACHUSETTS TO DISMISS APPEAL OR AFFIRM JUDGMENT BELOW OR, IN THE ALTERNATIVE, BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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## QUESTIONS PRESENTED

1. Does this Court have appellate jurisdiction over this matter pursuant to 28 U.S.C. §1254(2) where the Court of Appeals upheld a state statutory scheme against an assertion that it was repugnant to the Constitution of the United States and where no substantial federal questions are presented? 1/

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1/ Appellants' previous appeal of this matter was dismissed by this Court for want of jurisdiction. Hopfmann v. Connolly, ___ U.S. ____, 105 S. Ct. 2106 (1985) (dismissing appeal for want of jurisdiction but granting alternative petition for certiorari, vacating judgment below in part and remanding for further proceedings).

2. Is Article Six, Section III of the Charter of the Massachusetts Democratic Party (the "15% Rule") 2/,which has previously been reviewed and upheld by the Massachusetts Supreme Judicial Court in the related case of Langone v. Secretary of the Commonwealth 388 Mass. 185, 446 N.E. 2d 43, app. dism'd and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983), repugnant to the Constitution of the United States insofar as it applies to candidates for the Massachusetts Democratic Party's nomination for the office of United States Senator?

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2/ Article Six, Section III of the Charter of the Democratic Party for the Commonwealth of Massachusetts (the "15% Rule"), adopted at the

(Footnote Continued)

(Footnote Continuation)

party's 1979 Charter Convention, provides for party endorsement of candidates for state-wide elective office (Governor, Lieutenant Governor, United States Senator, Attorney General, Secretary of State, State Treasurer and State Auditor) through the mechanism of an election year Endorsing Convention. Endorsements are made by a majority vote of the delegates present and voting. However, candidates who, on any ballot, receive at least 15% of the votes cast at the Endorsing Convention for the state-wide office they seek and who otherwise meet the requirements of M.G.L. c. 53 may challenge that endorsement at the primary election. The candidate receiving a plurality of the votes cast at the Democratic primary becomes the Democratic nominee in the general election. M.G.L. c. 53, §2. The Massachusetts Supreme Judicial Court has construed the "15% Rule" as being incorporated into the state statutory scheme governing selection of the Democratic party nominees for statewide elective office. Langone v. Secretary of the Commonwealth, 388 Mass. 185, 446 N.E. 2d 443, app. dism'd. and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983). (The text of Article Six, Section III is attached to this Motion as Appendix A, and a copy of the Massachusetts Supreme Judicial Court's opinion in Langone is attached as Appendix B.

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## INTRODUCTION

Pursuant to Rule 16 of the Rules of this Court, appellees Chester G. Atkins (Chairman of the Massachusetts Democratic Party) and the Democratic State Committee of Massachusetts hereby move that the appellants' Appeal be dismissed for want of jurisdiction or that the judgment of the United States Court of Appeals for the First Circuit be affirmed on the ground that it is plainly correct and the questions presented by the Jurisdictional Statement are so insubstantial as not to warrant further argument.

For these same reasons, insofar as appellants' papers are treated as a Petition for Certiorari, these appellees oppose that Petition and request that this submission be treated in the alternative as a Brief in Opposition to the Petition.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the state statutory and federal Constitutional provisions cited by appellants, M.G.L. c. 52, §10; M.G.L. c. 53, §§2, 6, 9, 37, 38, 46 and 48; M.G.L. c. 54, §§116 and 116A; and Article Six, Section III of the Charter of the Massachusetts Democratic Party were also involved in the decision below. The pertinent texts of these additional provisions of the state statutory scheme for nomination and election of candidates for state-wide office are set forth in Appendix A and Appendix F.

## STATEMENT OF THE CASE

On June 4, 1982, appellants Alwin Hopfmann, a candidate for the Democratic Party nomination for the office of United States Senator from Massachusetts, and registered voters

Gregory Hession, Clarence Perkins, Clarence Paulin and Beth Sullivan (together hereafter referred to as "Hopfmann"), filed a five-count Complaint against defendants Michael J. Connolly (Secretary of State of the Commonwealth of Massachusetts); Francis X. Bellotti (Attorney General of the Commonwealth); Chester G. Atkins (Chairman of the Democratic State Committee of Massachusetts); and the Massachusetts Democratic State Committee ("appellees") in the United States District Court for the District of Massachusetts. Hopfmann's Complaint, challenging the validity and effect of the Massachusetts Democratic Party's "15% Rule" on federal and state constitutional and statutory grounds, sought declaratory and injunctive relief requiring Secretary Connolly to place Hopfmann's name on the September 14, 1982 Democratic Party state primary

ballot as a candidate for the Democratic Party's nomination for the office of United States Senator.

On June 16, 1982, Attorney General Bellotti moved to dismiss or stay the proceedings below pending the decision of the Massachusetts Supreme Judicial Court in the related proceeding of Langone v. Secretary of the Commonwealth, SJC Case No. 82-214. 3/ That motion was granted on June 21. On June 22, 1982, at Hopfmann's request, the District Court directed that a three-judge court be convened to hear and decide Hopfmann's claims under the Voting Rights Act, 42 U.S.C. §§1973, et seq., concurrently with the District

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3/ Langone v. Secretary of the Commonwealth was decided on July 9, 1982 and the Supreme Judicial Court's opinion in that case was later reported at 388 Mass. 185, 446 N.E.2d 443, app. dism'd. and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983) [Appendix B]

Court's consideration of Hopfmann's other claims. On June 24, 1982, Atkins and the Committee filed answers as well as a motion to dismiss. On June 30, 1982, Secretary Connolly likewise filed an answer and a motion to dismiss.

On June 29, 1982, Hopfmann filed a motion for a temporary injunction requiring Secretary Connolly to place Hopfmann's name on the Democratic primary ballot. After briefing by all parties, oral argument, and the submission of the Statement of Agreed Facts from Langone v. Secretary of the Commonwealth, supra, the three-judge panel and the District Court below (as single judge) both denied Hopfmann's motion on the ground that Hopfmann did not have the requisite "reasonable prospect of success" on any of his claims. Hopfmann, et al. v. Connolly, et al., Civil Action No. 82-1530-MC, Memoranda and Orders entered

July 7, 1982. On July 8, 1982, Hopfmann filed an application in this Court seeking a stay of these denials of preliminary relief and an order directing Secretary Connolly to place his name on the Democratic primary ballot. That application was denied by Justice Brennan on July 8, 1982 and, after resubmittal by Hopfmann, denied again by Justice Rehnquist on July 9, 1982. Hopfmann, et al. v. Connolly, et al., United States Supreme Court, Case No. A-18 (1982).

On September 20, 1982, Hopfmann filed a petition for writ of habeas corpus in this Court requesting that his name be placed on the Democratic primary ballot. That petition was denied by the full Court on October 18, 1982. In re Hopfmann, United States Supreme Court, Case No. 82-488, 51 U.S.L.W. 3298 (1982). On September 30, 1982, Hopfmann filed a

petition for writ of prohibition and/or mandamus and/or injunction in this Court, once again requesting that his name be placed on the Democratic primary ballot. That petition was denied by this Court on November 29, 1982. In re Hopfmann, United States Supreme Court, Case No. 82-610, 51 U.S.L.W. 3403 (1982). On October 25, 1982, Hopfmann filed an application in this Court seeking a stay of the general election or, in the alternative, a special primary election, which was denied by Justice Brennan on October 26, 1982, and, after resubmittal, again denied, this time by the full Court, on November 1, 1982. In re Hopfmann, United States Supreme Court, Case No. 82-610 (A-388), 51 U.S.L.W. 3339 (1982). Hopfmann's applications to this Court to enjoin the Governor of Massachusetts from certifying the election of Senator Edward M. Kennedy

and the United States Senate from seating him were denied by this Court on November 5, 1982. In re Hopfmann, United States Supreme Court, Case No. 82-610 (1982).

On September 30, 1982, the District Court denied appellees' renewed motions to dismiss, without prejudice to their renewal at a later date in light of developments in other courts. 4/ On October 26, 1982, Hopfmann filed a renewed motion for preliminary relief in the District Court and, on November 3, 1982, a motion for summary judgment.

A copy of the opinion of the Massachusetts Supreme Judicial Court in

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4/ An appeal from the Supreme Judicial Court's July 9, 1982 decision in Langone v. Secretary of the Commonwealth, supra, was then pending in this Court. This Court later dismissed that appeal for want of jurisdiction and denied the parallel petition for a writ of certiorari. Bellotti v. Connolly, 460 U.S. 1057 (1983).

the related case of Langone v. Secretary of The Commonwealth, 388 Mass. 185, 446 N.E.2d 43 (1983), [Appendix B] was filed with the District Court on February 23, 1983, and a copy of this Court's dismissal of the appeal and denial of the alternative petitions for certiorari in that case (Bellotti v. Connolly, 460 U.S. 1057 (1983)); was filed with the District Court on April 8, 1983. Shortly thereafter, appellees Atkins, Secretary Connolly and the Committee filed renewed motions to dismiss.

On February 9, 1984, appellants Hopfmann and Sullivan filed a new action in the District Court below seeking to have the "15% Rule" applied to all candidates for statewide political office and for President of the United States, regardless of party affiliation. Hopfmann, et al. v. Connolly, et al., Civil Action No.

84-393-MC. Defendants in that case moved to dismiss the Complaint.

On April 9, 1984, deciding both cases together and treating appellees' motions to dismiss as motions for summary judgment, the District Court granted appellees' motions and dismissed both of Hopfmann's Complaints. Hopfmann, et al. v. Connolly, et al., Civil Action No. 82-1530-MC. Hopfmann then appealed this case to the First Circuit Court of Appeals. The District Court's judgment in Civil Action No. 84-393-MC was not appealed, nor was the District Court's dismissal of Hopfmann's claims under the Voting Rights Act. On October 22, 1984 the First Circuit affirmed the judgment of the District Court. Hopfmann v. Connolly, 746 F.2d 97 (1st Cir. 1984). [Appendix C].

On May 13, 1985, this Court dismissed Hopfmann's appeal from the

First Circuit's judgment for want of jurisdiction. Hopfmann v. Connolly, ____ U.S. ____, 105 S.Ct. 2106 (1985). [Appendix D]. However, treating Hopfmann's papers as a petition for certiorari, this Court granted that petition, vacated the First Circuit's decision "to the extent it relied on [this Court's] dismissal of the appeals in Langone [v. Connolly, 460 U.S. 1057]," and remanded the case for further proceedings. Id. The First Circuit then solicited further briefs from the parties and subsequently issued a new opinion, with no reliance on the dismissal of the appeals in Langone, reaffirming its prior judgment on independent grounds. Hopfmann v. Connolly, 769 F.2d 24 (1st Cir. 1985) [Appendix E]. Hopfmann's petition for rehearing was denied by the full bench of the First Circuit on September 23, 1985. Hopfmann's Notice of Appeal to

this Court was filed on December 13, 1985 and his Jurisdictional Statement on December 24, 1985. Counsel for these appellees received the service copies of that Jurisdictional Statement on December 27, 1985.

## STATEMENT OF THE FACTS

By statute, the winner by a plurality of the votes cast in the Massachusetts Democratic Party primary becomes the official Democratic Party nominee at the general election. M.G.L. c. 53, §2. Also by statute, voting at the Democratic primary is open not only to enrolled party members, but also to unenrolled or independent voters who declare themselves "Democrats" at the polls just before receiving ballots. M.G.L. c. 53, §37. 5/. These voters may then cancel or change their party registration at the polling places immediately after voting. M.G.L. c. 53, §38. Thus, it is possible for a voter to be only a one-time "primary day Democrat" and have no other affiliation

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5/ As of February 1980, 39.9% of all registered Massachusetts voters were unenrolled. Opinion of the Justices, 385 Mass. 1201, 1205, 434 N.E.2d 960, 962 (fn. 1) (1982).

or desire for affiliation with the Democratic Party. Langone v. Secretary of the Commonwealth, 388 Mass. 185, 193, 446 N.E.2d 43, 47 app. dism'd. and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983).

Candidates seeking to have their names placed on the Democratic primary ballot for statewide office must satisfy several statutory requirements. The candidate must be an enrolled Democrat, M.G.L. c. 53, §48; file a financial disclosure form with the State Ethics Commission, M.G.L. c. 53, §9; submit nomination papers signed by at least 10,000 registered voters who can be either Democrats or independents, M.G.L. c. 53, §44, M.G.L. c. 53, §46; and comply with all party rules governing primary ballot access that neither defeat the purpose of a primary election nor violate the constitutional rights of candidates or voters.

Langone, supra, 388 Mass. at 194, 446 N.E.2d at 48. As observed by the Massachusetts Supreme Judicial Court, absent the "15% Rule", nothing in the statutory scheme would prevent a candidate who lacked the support of a single registered Democrat from being placed on the Democratic primary ballot and, notwithstanding little or no support from the regular party membership, from potentially becoming the Democratic Party candidate in the general election. Langone, supra, 388 Mass. at 191, 446 N.E.2d at 46.

Concerned with the decline of the party's organizational effectiveness and, in particular, with the fact that the then-existing statutory scheme allowed a candidate who did not share the party's ideals, had no intention of furthering those ideals if elected, and had no party accountability, to run for office as the official Democratic Party

nominee, the Democratic Party in 1977 appointed a Commission to draft a proposed state party Charter. The Commission held seven public meetings across the Commonwealth and, in the spring of 1979, submitted a proposed Charter to a specially convened Charter Convention. The delegates to the Charter Convention were elected at caucuses on March 24, 1979, conducted in every ward and town in the Commonwealth. All registered Democrats were eligible to take part in those caucuses, which were conducted on a "one Democrat, one vote" basis, and approximately 30,000 party members so participated.

A key provision of the Charter proposed by the Commission concerned the procedure by which the party would choose its nominees for statewide office. Following the model so successfully used (and judicially upheld

against constitutional challenge) in Connecticut, see Tansley v. Grasso, 315 F. Supp. 513 (D. Conn. 1970) (three-judge court), the Commission recommended that party nominees for statewide office be selected by a two-pronged procedure involving convention endorsement 6/ and the primary election. This procedure was set forth in Article Six, Section III, of the proposed Charter. Under this initially proposed version of Article Six, Section III, an Endorsing Convention, to be held in statewide election years, would, by majority vote, formally endorse one candidate for each statewide office. However, the Convention "endorsement" of a candidate

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6/ Although the statute requiring major parties to hold such conventions had been repealed in 1973, Massachusetts law specifically allows party state committees to call such conventions if they so chose. M.G.L. c. 52, §10.

could be challenged at the state party primary by any and all other candidates, otherwise qualified under state law, who, on any Convention ballot, received at least 20% of the votes cast for that office. The party would thus be assured that its ultimate nominee had demonstrated at least a minimal degree of support from the regular party membership in addition to the broad appeal to all voters who consider themselves Democrats which is needed to win the primary election. At the same time, the rights of significant minorities in the Party would be protected by their candidates being able to take their case directly to the primary voters through the "challenge" procedure, thus ensuring an open and democratic choice.

The Charter Convention debated Article Six, Section III -- including its proposed "20%" requirement -- and,

at the November 1979 continuation of the Convention, adopted the overall procedure of convention endorsement and primary selection, but struck a slightly different balance than that recommended by the Charter Commission. The Commission's recommendation that a candidate desiring to run in the primary obtain at least 20% of the votes for the office sought on any ballot at the Endorsing Convention was reduced by the Charter Convention to require only 15% of any such vote. The "15% Rule", as it came to be known, was then adopted by a roll-call vote of over two-thirds of the voting delegates at the Charter Convention. The overall Charter, as amended, was likewise adopted by an over two-thirds roll-call vote.

Under the terms of the Charter, any of its provisions could be amended at any State Convention by majority vote. Article Six, Section III

and its "15% Rule" were reaffirmed at the Party's April 11, 1981 Issues Convention and, in December, 1981, the Party issued its "Preliminary Call to Convention" which gave clear notice that the Party would be holding its 1982 Endorsing Convention pursuant to Article Six. Langone, supra, 388 Mass. at 198, 446 N.E.2d at 50 (fn.6). 7/

The "15% Rule" does not prevent candidates from appearing on the general election ballot. It merely places minimal restrictions on who may run as the official Democratic Party nominee for state-wide elective office to assure that the nominee has at least a degree of support among the regular party membership. Any candidate, including Hopfmann, who was dissatisfied

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7/ The "15% Rule" has been upheld and applied at each and every party convention from the time of its adoption through the present.

with the "15% Rule" could have declared himself an "unenrolled" (independent) candidate and attempted to qualify for the general election ballot as an independent at any time prior to February 4, 1982. M.G.L. c. 53, §6. Likewise, any such candidate was free at all times to conduct a "write in" campaign for the general election. M.G.L. c.54, §§116, 116A. Hopfmann pursued neither option.

On February 6, 1982, delegates to the 1982 Endorsing Convention were elected on a "one Democrat, one vote" basis at caucuses conducted in every ward and town throughout Massachusetts. Persons registered as Democrats prior to December 31, 1981, were eligible to take part in those February 6 caucuses and approximately 100,000 Democrats so participated. The Endorsing Convention was duly held on May 21-22, 1982, and candidates were endorsed for every

statewide office. Two amendments seeking either to repeal Article Six, Section III or postpone its effective date until January 1, 1983, were presented, debated and overwhelmingly defeated. Michael Dukakis was endorsed for Governor, Evelyn Murphy for Lieutenant Governor, and Edward Kennedy for United States Senator. 8/ Both of the candidates for the Party's nomination for Governor, five of the seven candidates for the Party's nomination for the Lieutenant Governorship, and one of the two candidates for the Party's nomination for United States Senator received at least 15% of the Convention votes on one or more ballots for that office and were thus eligible to run in the primary. Hopfmann did not receive 15% of the

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8/ Other candidates were likewise endorsed for the remaining state-wide elective offices.

Convention vote on any ballot for the office of Senator and, consequently, was ineligible. In accordance with the guidance provided by an advisory opinion of the Massachusetts Supreme Judicial Court, Opinion of the Justices, 385 Mass. 1201, 434 N.E.2d 960 (1982), Secretary Connolly did not print Hopfmann's name on the Democratic primary ballot.

The Democratic primary was duly held on September 14 and the General Election on November 2, 1982. Senator Edward Kennedy was the winner of both the primary and the election.

## SUMMARY OF ARGUMENT

Because the First Circuit upheld a state statutory scheme against federal constitutional attack, and because appellants have presented no substantial federal questions to this Court, Hopfmann's appeal should be dismissed by this Court for want of jurisdiction. To the extent appellants' papers are treated as a petition for certiorari, that petition should be denied for lack of merit.

Hopfmann's argument that the Massachusetts Democratic Party did not have the right under the First and Fourteenth Amendments to the United States Constitution to adopt the "15% Rule" and have it enforced by the state has already been exhaustively refuted by the Massachusetts Supreme Judicial Court in its comprehensive and well-reasoned unanimous opinion in Langone v. Secretary of the Commonwealth, 388 Mass.

185, 446 N.E.2d 43, app. dism'd. and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983). The importance of the "15% rule" to the Democratic Party and the fundamental nature of the Party interests which it protects -- to ensure that regular party members have some meaningful say in who their Party's nominees for state-wide office will be, to strengthen the Party structure, and to prevent Party raiding by "election day only" Democrats with little or no loyalty or commitment to the Party -- were carefully identified, analyzed and upheld by the Supreme Judicial Court. Likewise, the Supreme Judicial Court's opinion in Langone exhaustively considered and rejected the grounds on which Hopfmann bases his argument that the "15% Rule" violates his and his supporters' First and Fourteenth Amendment rights to ballot access. As the First Circuit held

below, the correctness of the Langone opinion on these issues, and the correctness of the dismissal of Hopfmann's claims on that same basis in this case, flows inexorably from this Court's decisions in Anderson v. Celebreeze, 460 U.S. 780, 793 (1983); Clements v. Fashing, 457 U.S. 957, reh. denied 458 U.S. 1133 (1982); Rodriguez v. Popular Democratic Party, 457 U.S. 1, 14 (1982); Democratic Party of the United States v. Wisconsin, 450 U.S. 107, 122-24 (1981); Cousins v. Wigoda, 419 U.S. 477, 491 (1975); Storer v. Brown, 415 U.S. 724, 732 (1974); Bullock v. Carter, 405 U.S. 134, 142-45 (1972); Jenness v. Fortson, 403 U.S. 431, 438-42 (1971); and Ray v. Blair, 343 U.S. 214 (1952). See also Republican Party of Connecticut v. Tashjian, 770 F.2d 265 (2d Cir. 1985). The "15% Rule" does not discriminate against any class of candidates or voters, nor disqualify any

candidates from appearing on the general election ballot, nor unfairly or unnecessarily burden the availability of political opportunity; Hopfmann's First and Fourteenth Amendment claims are thus without merit.

To the extent Article I, §4 applies to state party conventions or to party primaries themselves, the Supreme Judicial Court's holding in Langone, supra, construing the Massachusetts election laws (M.G.L. c. 53) as a matter of state law, likewise conclusively resolves both appellants' Article I, §4 and appellants' jurisdictional arguments against them. Under Article I, §4, the "legislature" of a state -- held by this Court to mean the entire state law-making process as construed by that state, Smiley v. Holm, 285 U.S. 355 (1932) -- may regulate the "time, place, and manner" of elections for the office of United States Senator. The state

lawmaking process may constitutionally include political party rules and procedures so long as the party rules so adopted do not otherwise infringe a candidate's constitutional rights. Clark v. Rose, 379 F. Supp. 73 (S.D.N.Y. 1974) (three-judge court), aff'd. 531 F.2d 56 (2d. Cir. 1976). See also Harris v. Conradi, 675 F.2d 1212, 1216 (11th Cir. 1982). As the Massachusetts Supreme Judicial Court ruled in Langone, the Massachusetts statutory scheme includes the "15% Rule". Langone, supra, 388 Mass. at 195-96; 446 N.E.2d at 48-49. See also M.G.L. c. 52, § 10, which specifically empowers party state committees to call conventions. This Court is bound by the Supreme Judicial Court's interpretation of the meaning of Massachusetts statutes. Kolender v. Lawson, 461 U.S. 352 (1983); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Brown v. Ohio, 432 U.S. 161, 168

(1977). Because the First Circuit upheld this state statutory scheme as conclusively interpreted by the state's highest court against appellants' federal constitutional attack, no appeal lies to this Court under 28 U.S.C. §1254(2).

Appellants' two remaining arguments, that the "15% Rule" violates Article I, §3 of the United States Constitution and/or the Seventeenth Amendment, are likewise without merit. Contrary to Hopfmann's assertions, the "15% Rule" does not add any "qualification" to those enumerated in Article I, §3; it merely states an eligibility requirement for candidates who seek the Democratic Party's nomination for that office. A candidate may be elected to that office without being the Democratic Party nominee, and thus not subject to the "15% Rule", by running as an independent, as the

candidate of another party, or by waging a successful "write-in" campaign. Langone, supra, 388 Mass. at 197-98, 446 N.E.2d at 50-51. For the same reasons, appellants' Seventeenth Amendment argument fails. The "15% Rule" does not change the "qualifications" of voters for the office of United States Senator or "dilute" their votes in any way. It applies equally to each Democratic party candidate for state-wide office; and every such candidate has a precisely equal opportunity to obtain delegate support. See also Republican Party of Connecticut v. Tashjian, 770 F.2d 265, 272-75 (2d. Cir. 1985).

## ARGUMENT

### I. BECAUSE THE COURT OF APPEALS UPHELD A STATE STATUTORY SCHEME AGAINST CONSTITUTIONAL ATTACK, NO APPEAL LIES TO THIS COURT UNDER 28 U.S.C. §1254(2).

Under 28 U.S.C. §1254(2), this Court has appellate jurisdiction over rulings of the Circuit Courts of Appeal

only where the party appealing relied on a state statute held by the Court of Appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States. Such is not the case here; indeed, the truth is quite the opposite. 9/ Contrary to appellants' arguments, in upholding the "15% Rule" -- which the Massachusetts Supreme Judicial Court has explicitly held to be part of the state statutory scheme for nominating state-wide Democratic candidates, Langone v. Secretary of Commonwealth, supra -- the First Circuit upheld the state statutory scheme against appellants' Constitutional attack. The Supreme Judicial Court is the "final judicial arbiter" of the meaning of Massachusetts statutes, and

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9/ Hopfmann's previous appeal of this matter was dismissed by this Court for want of jurisdiction. Hopfmann v. Connolly, ___ U.S. ____, 105 S.Ct. 2106 (1985).

its rulings on such questions are binding on this Court. Kolender v. Lawson, 461 U.S. 352 (1983); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Brown v. Ohio, 432 U.S. 161, 168 (1977).

The ruling of the Court below thus upheld a state statutory scheme against appellants' allegation that that scheme was repugnant to the United States Constitution. No appeal lies from such a determination under 28 U.S. §1254(2).

## II. WHATEVER FEDERAL QUESTIONS ARE PRESENTED BY THIS APPEAL ARE INSUBSTANTIAL AND WERE CORRECTLY DECIDED BY THE COURT BELOW.

### A. The Fundamental Interests of The Democratic Party Which the "15% Rule" Protects.

The importance of the "15% Rule" to the Massachusetts Democratic Party and the fundamental nature of the interests which it protects cannot be overemphasized. The "15% Rule" was and

is the centerpiece of the Party's 1979 Charter which revitalized and democratized the state Party structure. It was adopted by an over two-thirds vote after full debate by the Party's 1979 Charter Convention, which was composed of delegates elected on a "one Democrat - one vote" basis in caucuses, open to all Democrats (30,000 of whom participated), conducted in every ward and town of the Commonwealth, and has been voted on and upheld by every succeeding Party Convention. Over 100,000 Democrats from every ward and town in the Commonwealth participated in the causes that elected delegates to the 1982 Endorsing Convention which appellants challenge -- completely undercutting Hopfmann's claim that the "15% Rule" and the Endorsing Conventions are elitist institutions, controlled by the "party bosses" at the expense of the

party membership. Exactly the opposite is true.

As recognized by the Supreme Judicial Court when it reviewed and upheld the "15% Rule" against precisely the same First and Fourteenth Amendment challenge Hopfmann makes here, the "15% Rule" was adopted by the Party to ensure that regular party members had some meaningful say in who their party's nominees for state-wide office would be, to strengthen the Party structure, and to prevent party raiding by "election day Democrats" with little or no loyalty or commitment to the Party. Langone v. Secretary of the Commonwealth 388 Mass. 185, 446 N.E.2d 43, app. dism'd. and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983). The mechanism chosen by the Party -- the requirement that candidates for its nomination receive at least 15% of the vote at the Party's Endorsing

Convention on any ballot for the office they seek -- gives those Conventions a purpose and substantive meaning, thus encouraging all Democrats to participate in the caucus delegate selection procedure and so strengthening the Party. Through the Conventions, the ordinary rank and file Democratic Party member finally has access to a mechanism for making himself heard, and his ideas and ideals represented, in a meaningful way. Without this capacity to "speak to power" through the Convention Endorsing votes and the "15%" requirement, the Conventions lose much of their purpose, all of their power, and the caucus and convention structure so carefully nurtured and valued by the Party collapses.

At one and the same time, the "15% Rule" fits into the state statutory scheme regulating party primaries, enables ordinary Democrats to have a

meaningful say in the process by which their candidates are selected and, by only requiring a 15% vote on any ballot for the office sought, protects the rights of significant minorities in the party. It also ensures that whomever the ultimate party nominee is will have demonstrated at least minimal support among the regular party membership and thus a commitment to furthering the Party's ideals and program.

B. The Democratic Party's Right Under the First and Fourteenth Amendments to Adopt the "15% Rule" and Have it Enforced by the State.

In his Jurisdictional Statement, Hopfmann argues that the Massachusetts Democratic Party had no constitutionally protected right to adopt the "15% Rule". That argument -- previously considered and rejected by the Massachusetts Supreme Judicial Court in the related case of Langone v. Secretary of the Commonwealth, 388 Mass.

185, 446 N.E.2d 443, app. dism'd. and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983) -- is not only wrong; given this Court's unbroken line of First and Fourteenth "right of association" opinions in this area, it is frivolous.

The fundamental right of political parties to establish candidate selection procedures has repeatedly been recognized and upheld by this Court. Rodriguez v. Popular Democratic Party, 457 U.S. 1, 14 (1982); Democratic Party of the United States v. Wisconsin, 450 U.S. 107, 122-24 (1981); Cousins v. Wigoda, 419 U.S. 477, 491 (1975); and Ray v. Blair, 343 U.S. 214 (1952). As noted by the Massachusetts Supreme Judicial Court in its April 1982 advisory opinion regarding the "15% Rule":

> A determination of who will appear on a general election ballot as a candidate endorsed

> by an identified political party is a critical decision for that party. The party, therefore, has a substantial interest implicit in its freedom of association to ensure that party members have an effective role in that decision.

Opinion of the Justices, 385 Mass. 1201, 1204, 434 N.E.2d 960, 962 (1982).

This Court, time and again, has recognized the Constitutional right of a political party to protect its candidate selection process from undue influence by persons who are, at best, "election day" party members or who are not party members at all. See Rodriguez v. Popular Democratic Party, supra; Democratic Party of the United States v. Wisconsin, supra; Cousins v. Wigoda, supra; and Ray v. Blair, supra. See also Republican Party of Connecticut v. Tashjian, 770 F. 2d 265 (2d Cir. 1985); Abrams v. Reno, 452 F. Supp. 1166 (S.D. Fla. 1978) aff'd. 649 F.2d 342 (5th Cir. 1981), cert. denied, 455 U.S. 1016

(1982); Developments in the Law: Elections, 88 Harv. L. Rev. 1111, 1210 (1975). These principles were correctly applied by the Court below when it affirmed the dismissal of Hopfmann's claims.

### C. The "15% Rule" Does Not Violate Article I, §4 Of The United States Constitution.

Article I, §4 of the United States Constitution is an affirmative grant of power to the states and not, by itself, a limit on the power of states to regulate elections or to delegate aspects of the candidate selection process to political parties. Nor does it invalidate -- or authorize the invalidation -- of a political party's First and Fourteenth Amendment rights of association. The term "legislature" in Article I, §4 refers to the entire state lawmaking process as construed by that state. Smiley v. Holm, 285 U.S. 355 (1932); Davis v. Hildebrant, 241 U.S.

565 (1961). In Massachusetts, as the Supreme Judicial Court has so held, this lawmaking process also includes political party rules governing ballot access that neither defeat the purpose of a primary election nor violate the institutional rights of candidates or voters. Langone v. Secretary of the Commonwealth, 388 Mass. 185, 193, 446 N.E.2d 43, 47, app. dism'd. and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983). As held by the Massachusetts Supreme Judicial Court, the "15% Rule" is such a rule and, as such, is a valid and enforceable part of the state lawmaking process. Langone, supra, 388 Mass. at 194, 446 N.E.2d at 48. See also M.G.L. c. 52, § 10 (authorizing party state committees to call conventions). Such a delegation by the state is sanctioned by Article I, §4. Clark v. Rose, 379 F. Supp. 73, 77 (S.D.N.Y. 1974) (three- judge court)

aff'd. 531 F.2d 56 (2nd Cir. 1976). See also Harris v. Conradi, 675 F.2d 1212 (11th Cir. 1982); Tansley v. Grasso, 315 F. Supp. 513 (D. Conn. 1970) (three-judge court) (upholding similar delegation by Connecticut to political parties).

### D. The "15% Rule" Does Not Infringe Any Of The Appellants' First Or Fourteenth Amendment Rights

As correctly held by the Massachusetts Supreme Judicial Court in Langone, supra, and by the First Circuit below, the "15% Rule" does not infringe any of the appellants' First or Fourteenth Amendment rights.

A candidate has no fundamental constitutional right to run in a party primary and, potentially, to become that party's nominee. Clements v. Fashing, 457 U.S. 957, reh. denied 458 U.S. 1133 (1982); Bullock v. Carter, 405 U.S. 134, 142-43 (1972); Walker v. Yucht, 352 F.

Supp. 85, 97 (D. Del. 1972) (three-judge court); Developments in the Law: Elections, 88 Harv. L. Rev. 1111, 1176 (1975). Similarly, a voter does not have the constitutional right to expect that a candidate to his liking will be on the ballot. Lubin v. Panish, 415 U.S. 709, 716 (1974); Walker v. Yucht, supra at 92.

Both the state and political parties may constitutionally put reasonable restrictions upon access to primary ballots and, so long as all candidates are equally subject to those requirements and have an equal opportunity to meet them, no constitutional rights of the candidates or their supporters are infringed. Anderson v. Celebreeze, 460 U.S. 780, 788 fn.9 (1983) ("we have upheld generally applicable and even-handed restrictions that protect the integrity and reliability of the electoral process

itself"); Clements v. Fashing, 457 U.S. 957, reh. denied 458 U.S. 1133 (1982). (inquiry is whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity). See generally Developments in the Law: Elections, 88 Harv. L. Rev. 1111, 1176-77 (1975).

The "15% Rule" has, at most, an insignificant impact on Hopfmann's constitutional rights and any impact it may have is far outweighed by the fundamental interests of the Party which it serves and protects. It does not discriminate against any class of candidates or voters. It does not involve a classification based on wealth. It does not impose a burden on new or small political parties or independent candidates. Nor does it disqualify any candidate from appearing on the general election ballot. In short, as noted by the First Circuit

below, the "15% Rule" does not unfairly or unnecessarily burden the availability of political opportunity, and Hopfmann's claims under the First and Fourteenth Amendments are thus plainly without merit. Anderson v. Celebreeze, 460 U.S. 780, 793 (1983).

Ballot access schemes far more restrictive than those imposed by the "15% Rule" have been upheld against constitutional challenge many times, the closest case being Tansley v. Grasso, 315 F. Supp. 513 (D. Conn. 1970) (three-judge court) in which the constitutional validity of Connecticut's statutory requirement that a prospective candidate receive the support of at least twenty percent of the delegate vote in a party convention, on any roll-call vote, in order to qualify to run in the party primary, was unanimously upheld by the court. See also Storer v. Brown, 415 U.S. 724

(1974); Jenness v. Fortson, 403 U.S. 431 (1971); Rosario v. Rockefeller, 410 U.S. 752 (1973); Restivo v. Conservative Party, 391 F. Supp. 813 (S.D.N.Y. 1975) (upholding a "25%" requirement); Clark v. Rose, 379 F. Supp. 73 (S.D.N.Y. 1974) (three-judge court), aff'd. 531 F.2d 56 (2d Cir. 1976) (upholding a "25%" requirement).

As noted above, five of the seven candidates who submitted their names to the Massachusetts Democratic Party's Endorsing Convention for nomination to the office of lieutenant governor, one of the two candidates for the United States Senate race, and both candidates for the gubernatorial nomination received sufficient votes to qualify for the primary. Thus, the reasonableness of the "15% Rule", and the minimal nature of its requirements, are manifest. Langone, supra, 388 Mass. at 197, 446 N.E.2d at 49.

Finally, when evaluating any of the appellants' constitutional claims (including their Art. I, §3 and Seventeenth Amendment allegations), it is important to remember that ways other than the Democratic Party nomination exist for a candidate to get his or her name on the special election ballot. Hopfmann had the opportunity at any time up until February 4, 1982 to withdraw from the Democratic Party, declare himself an independent candidate, and enlist his supporters in an attempt to secure sufficient signatures on petitions to qualify for the November ballot. M.G.L. c.53, §6. Hopfmann's supporters retained the right to "write in" Hopfmann's name on the November election ballot, and to support other candidates who reflected their political views. M.G.L. c. 54, §§116 and 116A.

At root, under the guise of alleged "constitutional violations",

appellants are asking this Court to order the Democratic Party potentially to endorse a candidate who has not satisfied the party rules and has now chosen to challenge the wishes of a majority of its regular party members. If there are constitutional rights severely at risk, they are those of the regular Democratic Party members who, should this Court invalidate the "15% Rule", may potentially be represented in a general election by a candidate who has no significant support in the active party membership. Hopfmann chose to stay in the Democratic Party rather than become an independent. Having made that choice, he should be required to abide by the "15% Rule." As Judge Cabranes held in Republican Party of Connecticut v. Tashjian, 599 F. Supp. 1228 (D. Conn. 1984), aff'd. 770 F.2d 265 (2d Cir. 1985):

> Absent a malfunctioning of the machinery of the Connecticut Republican party that results in a perversion of its electoral processes, such as the arbitrary exclusion of members of particular ethnic or religious groups, there is no basis for the state to interfere in the party's decision making; the party's internal processes will supply any necessary corrective. Where all persons who share the party's basic philosophy can participate more or less equally in fashioning party rules, there is no reason to set those rules aside merely because a legislative majority thinks it can do a better job.

599 F. Supp. at 1232-33. While the Tashjian court spoke of legislative interference with party rules, its reasoning applies equally to judicial interference. Such interference, absent a "malfunctioning of the party's electoral processes" simply not present here, would violate the party's First Amendment rights of association. See also Ripon Society, Inc. v. National Republican Party, 525 F.2d 567, 585, n. 58 (D.C. Cir. 1975) (en banc), cert

denied, 424 U.S. 933 (1976) ("the [party's] primary purpose is to chart a course for the advancement of the party's ideals and it is in that light that the requirements of equal protection are to be discerned."); Bode v. National Democratic Party, 452 F.2d 1302 (D.C. Cir. 1971), cert. denied, 404 U.S. 1019 (1972); Moritt v. Rockefeller, 346 F. Supp. 34, 38 (S.D.N.Y. 1972) (three-judge court), aff'd. 409 U.S. 1020 (1972).

### E. The "15% Rule" Does Not Add Any "Qualification" To Those Enumerated In Article I, §3 Of The United States Constitution And Thus Does Not Violate Its Provisions.

In their Jurisdictional Statement, appellants mischaracterize the "15% Rule" as a "qualification" prohibited by Article I, §3. It is not. It is solely a rule setting a minimal restriction on who may run in the Democratic Party primary for

statewide political office and potentially become the party nominee. The distinction is a critical and decisive one.

The "15% Rule" in no way renders a candidate ineligible for the office of United States Senator. He or she is free to run as an independent, a "write in" candidate, or as the candidate of another political party and, if elected and if he or she meets the "qualifications" set forth in Article I, §3, will be fully "qualified" to take office despite his or her failure to comply with the "15% Rule". A prohibited "qualification" is something entirely different; such a "qualification" would render a candidate completely ineligible to take office even if elected by write-in vote. This critical distinction is highlighted in State v. Crane, 197 P.2d 864 (Wyo. 1948). In that case, at pages 870-71,

the Wyoming Supreme Court correctly notes that the test as to whether or not a "restriction" amounts to a "qualification" within the meaning of Article I, §3 is whether or not the candidate "could be elected if his name were written in by a sufficient number of electors." 197 P.2d at 871.

If Hopfmann's reading of Article I, §3 was correct, no ballot restriction for the office of United States Senator would be constitutionally valid. Under appellants' interpretation of Article I, §3, for example, Massachusetts could not constitutionally require that a candidate for major party nomination for the office of United States Senator must be a member of that party, M.G.L. c. 53, §48; file a financial disclosure form with the state Ethics Commission, M.G.L. c. 53, §9; and submit nominating papers signed by at least 10,000 registered voters, M.G.L.

c. 53, §§44, 46. Hopfmann's interpretation also ignores the rulings of this Court in such cases as Storer v. Brown, 415 U.S. 724 (1974), Jenness v. Fortson, 403 U.S. 431 (1971) and Rosario v. Rockefeller, 410 U.S. 752 (1973), all of which review and uphold ballot access restrictions over and above the "qualifications" set forth in Article I, §3.

### F. The "15% Rule" Does Not Violate The Seventeenth Amendment

Hopfmann's last argument, based on the Seventeenth Amendment, appeared for the first time in this litigation in his brief submitted to the First Circuit.

The Seventeenth Amendment, in relevant part, states:

> The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

In no way does the "15% Rule" infringe this Amendment.

At the caucuses which choose delegates to its Endorsing Conventions, the Democratic Party employs precisely the same voter qualifications as does the state, with only one exception; participants at the caucuses must be registered Democrats. Every candidate who desires the Democratic Party's nomination has precisely the same opportunity to get his supporters to those caucuses and, after the caucuses elect delegates to the Endorsing Convention, to solicit those delegates' votes. Moreover, as noted at several points in this Motion, any candidate for the office of United States Senator dissatisfied with the "15% Rule" has the opportunity to run as the candidate of another party, as an independent, or to conduct a "write-in" campaign. The qualifications of voters at the general

election are not affected by the "15% Rule", nor are their votes "diluted", and all candidates, regardless of what party nomination they bear (if any), have precisely the same chance before precisely the same voters. Hopfmann's argument to the contrary, Massachusetts is not a "one-party state" in which nomination by the Democratic Party is tantamount to election. Thus, appellants' belated Seventeenth Amendment arguments must be rejected.

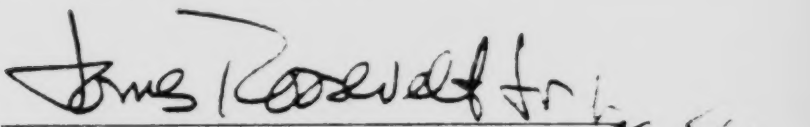
III. CONCLUSION.

The validity of the "15% Rule" and its importance to the Democratic Party have been repeatedly upheld by every Court that has considered its merits. For all of the foregoing reasons, appellees Chester G. Atkins and the Democratic State Committee respectfully request that this Court affirm the judgment of the Court below

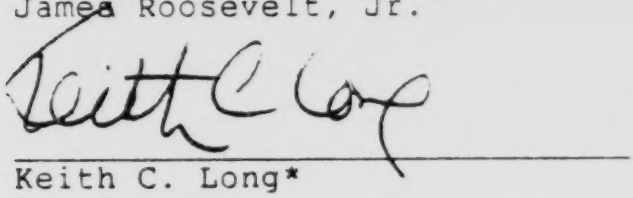
and dismiss appellants' appeal for want of jurisdiction. To the extent appellants' papers are treated as a Petition for Certiorari, appellees respectfully request that that Petition be denied.

CHESTER G. ATKINS and THE DEMOCRATIC STATE COMMITTEE OF MASSACHUSETTS

By their attorneys,



James Roosevelt, Jr.



Keith C. Long*

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Dated: January 24, 1986

# APPENDIX A

## ARTICLE SIX, SECTION III OF THE CHARTER OF THE MASSACHUSETTS DEMOCRATIC PARTY

Endorsing Convention

There shall be a state convention in even numbered years for the purpose of endorsing candidates for state wide offices in those years in which such office is to be filled. Endorsements for state wide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular office may challenge the Convention endorsement in a State Primary Election.

# APPENDIX B

(388 Mass. 185, 446 N.E.2d 43)

Frederick C. LANGONE, et al.1/

v.

SECRETARY OF the COMMONWEALTH, et al.2/

Supreme Judicial Court of Massachusetts, Suffolk.

Argued June 29, 1982.

Decided Feb. 16, 1983.

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James F. Kavanough, Jr., Boston (John J. McGivney, Boston, with him), for Frederick C. Langone & others.

Alexander G. Gray, Jr., Asst. Atty. Gen. (Gerald J. Caruso, Asst. Atty. Gen., with him), for the Attorney General, intervener.

David Berman, Medford, for Joel M. Pressman.

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1/ Madeline G. Sarno, Victor Grillo, Louis Ferretti, Gail A. Fasano, referred to herein as the Langone supporters, The Langone for Lieutenant Governor Committee, Joel M. Pressman, and plaintiff-intervenor, Francis X. Bellotti, as Attorney General of the Commonwealth.

2/ The Democratic State Committee, Evelyn F. Murphy, Samuel Rotondi, Louis R. Nickinello, John F. Kerry, and Lois E. Pines.

John Kenneth Felter, Boston (Richard A. Oetheimer and Samuel Hoar, Boston, with him) for Secretary of the Commonwealth.

James Roosevelt, Jr., Boston (Keith C. Long, James H. Wexler, Boston, with him), for Democratic State Committee.

William Highgas, Jr., Philip A. Chapman, Jr., Boston, J. Terence Gillan, and David Milstein, for the Governor, amicus curiae, submitted a brief.

Before HENNESSEY, C.J., and WILKINS, LIACOS, ABRAMS, NOLAN, LYNCH and O'CONNOR, J.J.

O'CONNOR, Justice.

Frederick C. Langone, four voters who claimed to be supporters of Langone's candidacy for Lieutenant Governor of the Commonwealth, and The Langone for Lieutenant Governor Committee, brought this action in the Superior Court against the Secretary of the Commonwealth. The complaint alleged that, by refusing to print Langone's name on the September 14, 1982, Democratic State party primary ballot as a candidate for the party's nomination for Lieutenant Governor, the Secretary

deprived the plaintiffs of various rights provided by statutes of the Commonwealth and guaranteed by the United States and Massachusetts Constitutions. An injunction was sought that would have required the Secretary to place Langone's name on the primary ballot. The other defendants, whose names appeared on the primary ballot, and Joel M. Pressman, as plaintiff, were added to the case on the Secretary's motion. The Attorney General intervened as a plaintiff and filed a complaint seeking declaratory relief and an order requiring the Secretary to place the names of Langone, Pressman, and "other candidates who have fully complied with all applicable statutory requirements imposed by G.L. c. 53, on the ballot for the state primary for the Democratic Party, notwithstanding any contrary provision of the party charter."

A single justice of this court allowed a joint "Petition for Transfer" to the Supreme Judicial Court for Suffolk County, and on a motion by all the parties, reserved and reported to the full court the following questions of law:

"1. Whether all candidates who have complied with applicable statutory requirements must appear upon the Democratic state primary ballots, notwithstanding the failure to obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the 'Charter of the Democratic Party of the Commonwealth'?

"2. Whether the decision by the Secretary of the Commonwealth that he will not place upon the Democratic state primary ballots those candidates who failed to obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the 'Charter of the Democratic Party of the Commonwealth,' but otherwise complied with the statutory requirements to have their names placed upon the ballots violated the constitutional or statutory rights of the voters, the candidates, or their supporters?"

On July 6, 1982, we issued an order that said "[u]pon consideration of

the argument and briefs of the parties, we interpret the State statutes in light of the State and Federal constitutions and rule that the Secretary must give effect to the relevant charter provision. Accordingly, we answer the questions reported, 'No.'" This opinion is an explanation of that order.

On April 23, 1982, the Justices of this court issued an advisory opinion to the Governor. Opinion of the Justices, 385 Mass. 1201, 434 N.E.2d 960 (1982). The first sentence of G.L. c. 53, § 44, as amended through St.1981, c. 278, § 1, states, "The nomination of candidates for nomination at State primaries shall be by nomination papers." There was pending before the Governor for his approval, House Bill No. 5852, which would have added, after that sentence, the following sentence: "Notwithstanding the charter, rule or by-law of a

political party, any candidate, who is enrolled in such political party, submitting nomination papers subject to the provisions of this chapter shall be a candidate for nomination at the state primary." The proposed language, if constitutional, would have rendered ineffective Article Six, Section III, of the charter of the Democratic party of the Commonwealth of Massachusetts which provides: "There shall be a State Convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular office may challenge the

Convention endorsement in a State Primary Election." This is popularly known as the 15% rule. The Justices interpreted the proviso to mean that a convention nominee who fails to receive at least 15% of the convention vote on any ballot is not entitled to have his or her name placed on the primary ballot. Id. at 1025, 434 N.E.2d 960. The Justices advised the Governor that "[i]f House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic party and its members to associate by allowing candidates to be placed on the Democratic State primary ballot in contravention of the party's charter." Id. at 1207-1208, 434 N.E.2d 960.

On May 21 and 22, 1982, the State Democratic party held its convention for the purpose of endorsing its candidates for statewide office. The defendants

Murphy, Rotondi, Kerry, Pines, and Nickinello received at least 15% of the convention vote cast on one or more ballots. The plaintiffs Langone and Pressman failed to obtain at least 15% of vote on any ballot. On May 25, 1982, the chairman of the Democratic State Committee sent a certified copy of the party charter to the Secretary and gave him the names of those individuals who had obtained at least 15% of the vote on one or more ballots, the Secretary released a statement that pursuant to the April 23 Opinion of the Justices, supra, he would be unable to place on the State primary ballot the names of Langone and Pressman although they had filed valid nomination papers. On the following day the Director of Elections sent letters to Langone and Pressman containing the same information. This action was commenced on June 2, 1982.

Candidates of political parties for statewide office in this Commonwealth are nominated at primaries held for that purpose. G.L. c. 53, §§ 2, 41. General Laws c. 53 provides several requirements for primary ballot access, including requirements that only persons certified as enrolled members of a political party may be candidates for that party's nomination, § 48, and that candidates for the nomination of a political party must file nomination papers containing at least 10,000 certified voter signatures. G.L. c. 53, § 44.3/ General Laws c. 53, § 44, further provides that "[t]he nomination of candidates for nomination at state primaries shall be by nomination

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3/ Both Langone and Pressman had complied with the requirements of G.L. c. 53, § 44, by filing nomination papers containing more than 10,000 certified voter signatures.

papers," and § 2, as appearing in St.1975, c. 600, § 7, provides that "[n]o candidates shall be nominated . . . in any other manner than is provided in this chapter or chapter fifty-two."4/ These several sections of G.L. c. 53 may reasonably be construed in two ways: as providing the only requirements for primary ballot access, excluding all others, or, in the alternative, as providing minimum requirements for primary ballot access but permitting imposition by the party of additional requirements that are consistent with a primary election system and do not infringe the constitutional rights of candidates and voters. Under the first construction, a candidate who satisfies the express statutory requirements would have a

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4/ General Laws, c. 52 is irrelevant to the present inquiry.

right to the printing of his or her name on the primary ballot. Under the second construction, compliance with the express statutory requirements would not entitle candidates to appear on the ballot in the absence of compliance with the party rule also. If we were to adopt the first construction, we think that G.L. c. 53 would be unconstitutional. However, we think that, since the provisions of G.L. c. 53 are not expressly preemptive, the second construction is permitted by reasonable principles of construction and would avoid constitutional difficulties. Therefore, we adopt it. "It is our duty to construe statutes so as to avoid . . . constitutional difficulties, if reasonable principles of interpretation permit it." School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 79-80, 431 N.E.2d 180 (1982). Staman v. Assessors of Chatham, 351 Mass. 479,

486-487, 221 N.E.2d 861 (1966). We discuss below our reasons for concluding that constitutional considerations require the second construction of G.L. c. 53.

In Opinion of the Justices, 385 Mass. at 1204, 434 N.E.2d 960, the Justices stated that the right to associate with the political party of one's choice is an integral part of the freedom of association for the advancement of common political beliefs protected by the First and Fourteenth Amendments to the Constitution of the United States. Kusper v. Pontikes, 414 U.S. 51, 56-57, 94 S.Ct. 303, 307, 38 L.Ed.2d 260 (1973). The Justices further stated that there is implicit in that freedom a political party's substantial interest in ensuring that party members have an effective role in determining who will appear on a general election ballot as that party's

candidate, citing Democratic Party of U.S. v. Wisconsin, 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981). The Justices noted that the winner by a plurality of a party primary in this Commonwealth becomes that party's candidate in the general election, and that voting in the party primary is open both to voters who are enrolled as party members before the primary and to those who are unenrolled until they request that party's ballot at the polls. G.L. c. 53, § 37. They noted also that the registered voters who sign nomination papers need not be members of the party. G.L. c. 53, § 46. It followed that if the only requirements for primary ballot access were the existing Massachusetts statutory requirements unaugmented by party rule, "a candidate for statewide election could be placed on the Democratic party ballot and win the primary, thus becoming entitled to

be placed on the general election ballot as the Democratic party candidate, with little or no support from the regular party membership." Id. 385 Mass. at 1205, 434 N.E.2d 960. The Justices concluded that this would substantially infringe the Democratic party's right of freedom of association, id. at 1206, 434 N.E.2d 960, and that the Commonwealth's interest in the integrity of the election process does not constitutionally justify elimination of party control over who the party's candidate in the general election will be. Id. at 1207, 434 N.E.2d 960.

In answering the questions reported by the single justice in the case before us, we recognized that advisory opinions, "although necessarily the result of judicial examination and deliberation, are advisory in nature, . . . not adjudications by the court, and do not fall within the doctrine of

stare decisis." Commonwealth v. Welosky, 276 Mass. 398, 400, 117 N.E.656, cert. denied, 284 U.S. 684, 52 S.Ct. 201, 76 L.Ed. 578 (1931). "In accordance with our duty, we examine[d] the [questions reported by the single justice] anew, unaffected by the advisory opinion." Lincoln v. Secretary of the Commonwealth, 326 Mass. 313, 314, 93 N.E.2d 744 (1950). We were aided in that effort by the oral arguments and briefs of the parties. We again concluded that G.L. c. 53 would substantially infringe the Democratic party's fundamental right of association if it eliminated the 15% rule, thus necessitating strict scrutiny, which it does not survive. Bachrach v. Secretary of the Commonwealth, 382 Mass. 268, ___, Mass. Adv. Sh. (1981) 93, 101, 415 N.E.2d 832. More of an intrusion on the party's fundamental right of association than is required to protect the

Commonwealth's compelling interest in the integrity of the election process, American Party of Texas v. White, 415 U.S. 767, 783, 94 S.Ct. 1296, 1307, 39 L.Ed.2d 744 (1974), Kusper v. Pontikes, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973), Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973), is not constitutionally permissible. See Riddell v. National Democratic Party, 508 F.2d 770, 776-778 (5th Cir. 1975). The Commonwealth's interest in the integrity of the election process does not require, and therefore does not permit, preclusion of a party rule that reserves to its convention delegates the right to bar from the party's primary ballot candidates who lack the support of at least 15% of those delegates on any convention ballot.

In Democratic Party of U.S. v. Wisconsin, 450 U.S. 107, 101 S.Ct. 1010,

67 L.Ed.2d 82 (1981), the United States Supreme Court struck down a State statute that compelled the Democratic party, contrary to national party rules, to seat delegates at its national convention who were bound by the statute to vote on the first ballot in accordance with the results of an open primary. An open primary is one in which any registered voter can participate regardless of party affiliation and without publicly declaring it. The plaintiffs argue that Democratic Party of U.S. v. Wisconsin, supra, stands only for the proposition that a State may not interfere with the internal affairs of a national political party, such as the naming of the party's delegates to its national convention. We think that the principle enunciated in that case is not so narrow. The Court phrased the question before it as "whether, once Wisconsin has opened its

Democratic Presidential preference primary to voters who do not publicly declare their party affiliation, it may then bind the National Party to honor the binding primary results, even though those results were reached in a manner contrary to National Party rules." Id. at 120, 101 S.Ct. at 1018. Reasoning that "the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions - thus impairing the party's essential functions - and that political parties may accordingly protect themselves 'from intrusion by those with adverse political principles," Ray v. Blair, 343 U.S. 214, 221-222 [72 S.Ct. 654, 657-658, 96 L.Ed. 894 [1952]," id. at 122, 101 S.Ct. at 1019, the Court held that "if Wisconsin . . . open[s] its primary, it cannot require that Wisconsin delegates to the National Party Convention vote there in

accordance with the primary results, if to do so would violate Party rules." Id. at 126, 101 S.Ct. at 1021. To be sure, the Court declared that the Wisconsin statute impermissibly interfered with the party's internal affairs, as the plaintiffs point out, but it is significant that the Court's focus was on the nature of the interference, which was the imposition on the party of convention votes for the party's presidential nominee that may not have reflected the choice of party members.

In order to vote at a Massachusetts primary, an unenrolled voter may enroll in a political party at the polling place immediately before voting, and receive that party's ballot. G.L. c. 53, § 37. The voter may become unenrolled again, or change his or her enrollment on the day following the primary. G.L. c. 53, § 38. This

section also provides that at primaries a clerk shall make available within the polling place certificates to enable a voter to make such changes. Since these provisions require that part affiliation be publicly declared, the Massachusetts primary is not technically "open" as was the Wisconsin primary in Democratic Party of U.S. v. Wisconsin, supra, but the availability of party affiliation to unenrolled voters, which can be little more than momentary and may be for a purpose that is entirely inconsistent with, or at least unsupportive of the principles of the party, blurs any meaningful distinction between open and closed primaries. See Democratic Party of U.S. v. Wisconsin, supra 450 U.S. at 133, 101 S.Ct. at 1024 (Powell, J., with whom Blackmun and Rehnquist, JJ., joined, dissenting). Such affiliation demonstrates neither commitment to, nor acceptance of, the political, social,

and economic philosophies and programs for which the party has organized. "[A] political party has a legitimate -- indeed, compelling -- interest in ensuring that its selection process accurately reflects the collective voice of those who, in some meaningful sense, are affiliated with it. Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being" (emphasis added). L. Tribe, American Constitutional Law 791 (1978).

Since nomination papers may be signed by unenrolled voters, G.L. c. 53, § 46, and since voters at the primary may have only a tenuous affiliation with the party, c. 53, § 37, if G.L. c. 53 nullifies a party rule requiring that a candidate for nomination have a modicum

of support from members with substantial affiliation with the party, it as effectively eliminates that party's control of who its candidates in general elections will be as did the Wisconsin statute held unconstitutional in Democratic Party of U.S. v. Wisconsin, supra. We view this as a substantial interference with the fundamental rights of association guaranteed to the party and its members by the First and Fourteenth Amendments. Therefore, we reject a construction of G.L. c. 53 that would render ineffective all party rules governing primary ballot access, and we construe the statute as permitting any such rule that neither defeats the purpose of a primary election system nor violates the constitutional rights of candidates or voters.

We turn to a consideration whether a construction of G.L. c. 53 as recognizing the Democratic party's 15%

rule would defeat the legislative purpose in providing for primary elections, and we conclude that it would not. The aim of the primary system is the encouragement of wide participation in politics and discouragement of candidate selection by party bosses. Democratic Party of U.S. v. Wisconsin, supra at 127, 101 S.Ct. at 1021 (Powell, J., with whom Blackmun and Rehnquist, JJ., joined, dissenting). Popular participation in the candidate selection process is assured by G.L. c. 53, § 44, requiring nomination papers signed by at least 10,000 registered voters, and by c. 53, § 37, which provides that primary votes may be cast by persons who are unenrolled until they go to the polls. This broad citizen participation is not negated by application of the 15% rule. The fact that five candidates for selection as the Democratic party's candidate for Lieutenant Governor

received sufficient delegate support to satisfy the party charter requirement warrants the inference that the selection process was not dominated by party bosses. The 15% rule does not defeat the legislative purpose in adopting a primary system. We need not consider at what point the legislative purpose would be defeated by a different party rule requiring a higher percentage of delegate support.

Primary elections are the creatures of statute and are an integral part of the election process. United States v. Classic, 313 U.S. 299, 314, 61 S.Ct.. 1031, 1037, 85 L.Ed. 1368 (1941). Enforcement by the Commonwealth of the 15% rule is State action and is, therefore, subject to constitutional scrutiny. Bullock v. Carter, 405 U.S. 134, 140, 92 S.Ct. 849, 854, 31 L.Ed.2d 92 (1972). Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152

(1953). Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944). Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932). Nixon v. Herndon, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1927). See L. Tribe, American Constitutional Law 787 (1978). 5/ For the purpose of evaluating the plaintiffs' claims that the 15% rule violates rights guaranteed to them by the Federal and State Constitutions, we treat the rule as though it were expressly contained in G.L. c. 53. See

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5/ We have recently held that the protection of art. 9 of the Massachusetts Declaration of Rights is not from State action alone. Batchelder v. Allied Stores Intl., Inc., 388 Mass. 83, 88, 445 N.E.2d 590 (1983). But since we find state action present, we need not decide whether that case negates the necessity of State action under our State Constitution.

L. Tribe, American Constitutional Law 790 n. 2 (1978).

We have concluded that G.L. c. 53 would violate the constitutional rights of the Democratic party and its members if it were to exclude every form of primary ballot access control by party members with a more substantial party affiliation than is demonstrated by accepting a Democratic party ballot on primary election day. We have also concluded that enforcement of the 15% rule would not defeat the legislative purpose in adopting a primary system. We must further inquire whether G.L. c. 53, as augmented by the 15% rule, would deprive the plaintiff candidates or voters of rights of free speech and association guaranteed to them by the First and Fourteenth Amendments to the Constitution of the United States and arts. 1, 16, and 19 of the Massachusetts Declaration of Rights, or would violate

their rights to equal protection secured by the Fourteenth Amendment or their rights to freedom and equality of elections secured by art. 9 of the Declaration of Rights. The same basic issues relative to the United States Constitution must be addressed whether our analysis be in First Amendment or equal protection terms.

The first question to be resolved is whether State enforcement of the 15% rule must withstand strict scrutiny or only a rational basis test. Strict scrutiny is required if the interests asserted by the plaintiffs are fundamental and the infringement of them is substantial. Bullock v. Carter, 405 U.S. 134, 142-144, 92 S.Ct. 849, 855-856, 31 L.Ed.2d 92 (1972). In that event, the 15% rule must serve a compelling State interest with as little infringement as possible in order to be constitutionally permissible. Bachrach

v. Secretary of the Commonwealth, 382 Mass. 268, ____, Mass.Adv.Sh. (1981) 93, 101, 415 N.E.2d 832. On the other hand, if the asserted interests are not fundamental or the impact on them of the 15% rule is not substantial, State enforcement of the rule is constitutional if it is rationally based. Bullock v. Carter, supra.

Langone and Pressman assert that enforcement of the 15% rule abridges their rights of candidacy, and the Langone supporters and the Langone Committee assert interference with their rights as voters. Although the right to run for public office may not be a fundamental right, see Bullock v. Carter, supra 405 U.S. at 142-143, 92 S.Ct at 855, but see Mancuso v. Loft, 476 F.2d 187, 195 (1st Cir.1973), and it clearly is not absolute, Opinion of the Justices, 375 Mass. 795, 811, 376 N.E.2d 810 (1978), the right to vote is

fundamental, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667, 86 S.Ct. 1079, 1081, 16 L.Ed.2d 169 (1966), Reynolds v. Sims, 377 U.S. 533, 561-562, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506 (1964), see Sears v. Secretary of the Commonwealth, 369 Mass. 392, 399, 341 N.E.2d 264 (1975), and restrictions on the access of candidates to the ballot inevitably have impact on voters' rights. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184, 99 S.Ct. 983, 990, 59 L.Ed.2d 230 (1979). Lubin v. Panish, 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974). Bullock v. Carter, supra 405 U.S. at 143, 92 S.Ct at 855. Therefore, we treat the interests asserted by the candidates, as well as those asserted by the voter plaintiffs, as fundamental.

A determination whether the restrictions on primary ballot access resulting from the application of G.L.

c. 53, and the 15% rule have a sufficient impact on the plaintiffs' fundamental interests to compel strict scrutiny, requires an examination of that impact "in a realistic light." Bullock v. Carter, supra at 143, 92 S.Ct. at 855. Clough v. Guzzi, 416 F.Supp. 1057, 1066 (D.Mass.1976). We are satisfied that the burden on candidacy and voting rights that results from enforcement of the 15% rule is insufficient to warrant strict scrutiny and that the appropriate inquiry is whether the effect of G.L. c. 53, supplemented by the 15% rule, is rationally related to the furtherance of legitimate state interests. See Storer v. Brown, 415 U.S. 724, 733-736 & n. 7, 94 S.Ct. 1274, 1280-1282 & n. 76, 39 L.Ed.2d 714 (1974)(statute disqualifying independent candidate who was registered member of any party within one year prior to primary election, valid);

Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971) (independent candidates required to submit petition with signatures of 5% of the eligible voters).

We begin our examination of the impact of the 15% rule with the observation that discrimination between those who gain the support of at least 15% of the convention delegates and those who do not is not invidious. Enforcement of the 15% rule does not deny candidates access to the primary ballot in an unfair way, such as by imposing prohibitive filing fees. See Bullock v. Carter, supra. Everyone who seeks to have his or her name printed on the Democratic primary ballot has the same opportunity to gather the necessary signatures and convention support. No one is required to obtain a greater percentage of the delegate votes than anyone else. That reasonable

opportunity exists to garner the necessary delegate support is demonstrated by the fact that five candidates for the Democratic nomination for Lieutenant Governor did so.

Participation in a primary is not the only route available to the plaintiffs to enable them to associate and express political ideas. Bachrach v. Secretary of the Commonwealth, 382 Mass. 268, 415 N.E.2d 832 (1981). A candidate for statewide office is entitled to appear on the general ballot as an independent by compliance with the provisions of G.L. c. 53, § 6. To the extent, however, that the plaintiffs wish to associate and express their ideas as Democrats, those ideas may be represented by several candidates who obtained the requisite convention support. Every voter cannot be assured that a candidate to his liking will be

on the ballot. Lubin v. Panish, supra 415 U.S. at 716, 94 S.Ct at 1320. "So long as the ideas in which a potential candidate and other party members believe can be represented by another candidate, the primary purpose of political association has been served. A candidate may, of course, prefer to be the party nominee, but judicial cognizance of that interest as an element of associational rights would be merely a backdoor way of establishing [an absolute] right to candidacy." Developments in the Law -- Elections, 88 Harv.L.Rev. 1111, 1176, 1177 (1975).

Not only does the Commonwealth have a legitimate interest in protecting the constitutional rights of the Democratic party and its members to associate, see South Carolina v. Katzenbach, 383 U.S. 301, 327, 86 S.Ct. 803, 818, 15 L.Ed.2d 769 (1966), but it also has a proper

interest "in maintaining the integrity and stability of existing political parties, thus encouraging responsible action on their part." Tansley v. Grasso, 315 F.Supp. 513, 517 (D.Conn.1970). This interest is served by assuring that candidates who appear on the general election ballot as representatives of the Democratic party are truly representative of the party as demonstrated by the support of at least 15% of the party's convention delegates on one or more convention ballots. "The preservation of the integrity of the various routes to the ballot is a proper State objective." Opinion of the Justices, 368 Mass. 819, 823, 333 N.E.2d 380 (1975). We conclude, therefore, that G.L. c. 53, supplemented by the 15% rule, is rationally related to legitimate State interests and does not violate any rights guaranteed to the

plaintiffs by the United States Constitution. 6/

Although the plantiffs claim that State implementation of the 15% rule would violate rights guaranteed to them by arts. 1, 9, 16, and 19 of the Massachusetts Declaration of Rights, 7/

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6/ Langone contends that he had insufficient notice of the requirements for primary ballot access and that therefore his right to due process guaranteed by the Fourteenth Amendment was violated by the failure of the Secretary to print his name on the primary ballot. This contention is without merit. In December, 1981, the Democratic party issued its "Preliminary Call to Convention," which gave clear notice that the party would be holding its endorsing convention pursuant to Article Six of the party's charter. Any assumption that G.L. c. 53 provided the exclusive requirements for primary ballot access was unwarranted.

7/ These articles of the Massachusetts Declaration of Rights state:

Article 1, as appearing in art. 106 of the Amendments to the Massachusetts Constitution,

they advance no separate reasons, and we are unaware of any, to conclude that the Massachusetts Constitution affords them protection not provided by the First and Fourteenth Amendments of the United States Constitution. We have previously said that the freedoms protected by arts. 16 and 19 are "comparable to those guaranteed by the First Amendment."

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7/ (continued) - provides: "All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."

Article 9 provides: "All elections ought to be free; and all the inhabitants of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments."

First Nat'l. Bank v. Attorney Gen., 371 Mass. 773, 792, 359 N.E.2d 1262 (1977), rev'd on other grounds 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 249, 69 N.E.2d 115 (1946). The Justices have said that "[t]he Massachusetts Constitution does not refer to primaries as such, but concerns itself only with elections." Opinion of

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7/ (continued)

Article 16, as appearing in art. 77 of the Amendments to the Massachusetts Constitution, provides: "The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this Commonwealth. The right of free speech shall not be abridged."

Article 19 provides: "the people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good: give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer."

the Justices, 359 Mass. 775, 776-777, 268 N.E.2d 159 (1971). Even if the Massachusetts Constitution were to apply to primaries because of their effect on general elections, "the right 'to be elected,' preserved in art. 9, is not absolute. It is subject to legislation reasonably necessary to achieve legitimate public objectives." Opinion of the Justices, 375 Mass. 795, 811, 376 N.E.2d. 810 (1978). See Opinion of the Justices, 368 Mass. 819, 823, 333 N.E.2d 380 (1975).

Thus, we have completed the constitutional analysis which requires that we construe G.L. c. 53 not to exclude, but rather, to accommodate the 15% rule. No candidate who fails to obtain at least 15% of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III, of the "Charter of the Democratic Party of

the Commonwealth" must appear on the Democratic State primary ballot. The decision of the Secretary of the Commonwealth to that effect did not violate the constitutional or statutory rights of the voters, candidates, or candidates' supporters.

APPENDIX C

(746 F.2d 97)

Alwin E. HOPFMANN, et al.,

Plaintiffs, Appellants,

v.

Michael Joseph CONNOLLY, et al.,

Defendants, Appellees.

No. 84-1317.

United States Court of Appeals,
First Circuit.

Argued Sept. 10, 1984.

Decided Oct. 22, 1984.

Rehearing and Rehearing En Banc Denied
Dec. 10, 1984.

Lawrence J. Ball, Detroit, Mich., with whom Stephen P. Dowd, Laurence Elgin, James F. Schoener, Miller, Canfield, Paddock & Stone, Detroit, Mich., were on brief, for plaintiffs, appellants.

Alexander G. Gray, Jr., Asst. Atty. Gen., with whom Francis X. Bellotti, Atty. Gen., Boston, Mass. was on brief, for Michael Joseph Connolly Francis X. Bellotti, defendants, appellees.

Keith C. Long, Boston, Mass., with whom James Roosevelt, Jr., James H. Wexler, and Herrick & Smith, Boston, Mass., were on brief, for Chester G. Atkins and the Democratic State Committee of Massachusetts, defendants, appellees.

Before CAMPBELL, Chief Judge, COWEN,* Senior Circuit Judge, and BOWNES, Circuit Judge.

COWEN, Senior Circuit Judge.

This is an appeal from an order of the District Court for the District of Massachusetts which dismissed appellants' (plaintiffs') complaint. The principal plaintiff, Alwin E. Hopfmann, was an unsuccessful candidate for the Democratic nomination for the office of United States Senator in 1982. He, and four individuals who desired to vote for him, brought this action in the district court against the Secretary of the Commonwealth of Massachusetts. The Attorney General of the Commonwealth of Massachusetts, the Chairman of the Democratic Party of the Commonwealth of Massachusetts, and the Democratic State Committee of Massachusetts (defendants). Plaintiffs sought injunctive and declaratory

relief, claiming that a cornucopia of constitutional rights were violated when Hopfmann's name was excluded from the ballot in the Democratic primary. For the reasons to be set forth, we affirm the decision of the district court.

I.

This action is basically an attack on the constitutionality and validity of Article Six, Section III of the Charter of the Massachusetts Democratic Party (the 15 percent rule), which provides that only those candidates who receive 15 percent of the vote on any ballot at the convention may challenge the convention's endorsement in a state primary election. In 1982, Hopfmann failed to obtain 15 percent of the vote and the Secretary of the Commonwealth of Massachusetts ordered his name excluded from the primary ballot. The filing of the complaint followed this action.

After the filing of the complaint, defendants filed motions to dismiss. On June 24, 1982, proceedings were stayed pending the decision of the Massachusetts Supreme Judicial Court in the related proceeding of Langone v. Secretary of the Commonwealth. A three-judge panel was convened to consider the issues, brought under the Voting Rights Act, 42 U.S.C. § 1973 et seq., and on July 7, 1982, the panel denied preliminary relief on the claim. On July 8, 1982, plaintiffs' application, seeking a stay of the denial of preliminary relief and an order directing the Secretary of the Commonwealth to place Hopfmann's name on the Democratic ballot, was denied by Justice Brennan. After resubmittal, it was denied by Justice Rehnquist on July 9, 1982. Hopfmann's petition for a writ of habeas corpus (requesting that his name be placed on the Democratic

primary ballot) filed September 20, 1982, was denied by the full United States Supreme Court on October 18, 1982. Plaintiffs' petition for a writ of prohibition and/or mandamus and/or injunction, requesting that Hopfmann's name be placed on the Democratic primary ballot, filed September 30, 1982, was denied by the United States Supreme Court on November 29, 1982. Plaintiffs' application, filed October 25, 1982, seeking a stay of the general election or, in the alternative, a special primary election, was denied by Justice Brennan on October 26, 1982. After resubmittal, it was again denied, by the full United States Supreme Court, on November 1, 1982. Plaintiffs' applications, filed November 5, 1982, to enjoin the Governor of Massachusetts from certifying the election of Senator Edward M. Kennedy, and the United States Senate from seating him, were also

denied by the United States Supreme Court.

A copy of the opinion of the Massachusetts Supreme Judicial Court in Langone v. Secretary of the Commonwealth, 388 Mass. 185, 446 N.E.2d 43 (1983), was filed with the district court on February 23, 1983. On April 8, 1983, a copy of the order of the United States Supreme Court, dismissing the appeal in that case and denying the alternative petition for certiorari was filed with the district court. Langone v. Connolly, 160 U.S. 1057, 103 S.Ct. 1510, 75 L.Ed.2d 938 (1983).

On April 9, 1984, the district court, treating defendants' motions to dismiss as motions for summary judgment, granted them and dismissed the complaint.

II.

Here, as in the court below, plaintiffs' principal attack on the 15 percent rule is the contention that the

enforcement of the rule violates their rights under the First and Fourteenth Amendments to the United States Constitution. The parties are agreed that Hopfmann had complied with the state statutory requirement (Mass. G.L. c. 53) for having his name placed on the primary ballot. To comply with state requirements, candidates must submit nomination papers signed by 10,000 voters. Specifically, plaintiffs argue that since this statutory requirement had been met, the denial of Hopfmann's access to the ballot in the primary election and the deprivation of the rights of the remaining parties to participate in choosing the party's candidates, abridged rights guaranteed to them by the First and Fourteenth Amendments.

As stated above, proceedings in the district court were stayed pending the decision in Langone v. Secretary of the

Commonwealth, supra, which was decided February 16, 1983. Contrary to plaintiffs' position in this appeal, the Supreme Judicial Court of Massachusetts held in that case that G.L. c. 53 incorporated the 15 percent rule, and that the rule did not deprive candidates or voters of their rights of free speech, association, due process, or equal protection guaranteed to them by the First and Fourteenth Amendments of the United States Constitution. The United States Supreme Court summarily dismissed the appeal from that decision for want of jurisdiction in April, 1983. Langone v. Connolly, supra. The district court's decision in this case was largely based on the decision of the Supreme Judicial Court and the dismissal of the appeal in that case by the United States Supreme Court.

Relying on Hicks v. Miranda, 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975), defendants urge that the dismissal of the appeal by the United States Supreme Court for lack of jurisdiction, i.e., for want of a substantial federal question, is a decision on the merits which is binding on this court and is dispositive of the First and Fourteenth Amendment claims. Citing Maryland v. Baltimore Radio Show, 338 U.S. 912, 919, 70 S.Ct. 252, 255, 94 L.Ed. 562 (1950), plaintiffs respond that it is not clear that the Supreme Court's decision was a dismissal of the appeal, and instead, may be construed as a denial of the petition for certiorari. Consequently, they argue that the decision has no precedential value in this court.

We agree with the contentions of defendants. In Langone v. Connolly,

the appellants couched their jurisdictional statement in the alternative, requesting that the statement be treated as an appeal under 28 U.S.C. § 1257(2), and to the extent that the statement would not be considered an appeal under that subsection, they requested that it be treated as a petition for certiorari under 28 U.S.C. § 1257(3). The order of dismissal of the United States Supreme Court stated:

> The appeals are dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari is denied. [Emphasis added.]

We find that the circumstances in Langone v. Connolly show that plaintiffs' application to the United States Supreme Court was treated as an appeal under 28 U.S.C. § 1257(2) and dismissed. The dissent of Justice Stevens, in which Justice Rehnquist and

Justice O'Connor joined, leads us to that conclusion. The dissent of Justice Stevens stated in part:

> These appeals present substantial, unresolved questions regarding the accommodation of competing First Amendment values: the interests of would-be candidates and voters in eligibility for the ballot, and the interests of party members in political association without undue governmental intrusion. * * *
>
> The case is properly before this Court on appeal.
>
> * * * *

460 U.S. at 1057 and 1058, 103 S.Ct. at 1510 and 1511, 75 L.Ed.2d at 938 and 939. The language in the majority's dismissal of the petition is understandable when read in conjunction with appellants' jurisdictional statement. We think that the majority of the Supreme Court was taking an extra precaution to deny the application in toto, since the order stated that the appeal was dismissed for lack of

jurisdiction, but that if the papers were treated as a petition for certiorari, the petition was also denied.

In holding that the decision of the United States Supreme Court in Langone v. Connolly is final and binding, we are mindful of Justice Brennan's concurring opinion in Mandell v. Bradley, 432 U.S. 173, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977), giving narrow scope to summary dispositions by the United States Supreme Court. In pertinent part, that opinion states:

> After today, judges of the state and federal systems are on notice that before deciding a case on the authority of a summary disposition by this Court in another case, they must (a) examine the jurisdictional statement in the earlier case to be certain that the constitutional questions were the same and if they were, (b) determine that the judgment in fact rests upon decision of those questions, not even arguably upon some alternative nonconstitutional ground. The judgment should not be interpreted as deciding the constitutional questions unless no other construction of the disposition is

plausible. [432 U.S. at 180, 97 S.Ct. at 2242.]

An examination of the appellants' jurisdictional statement clearly shows that the same constitutional questions which are raised by plaintiffs' First and Fourteenth Amendment claims in this case, were at issue in Langone v. Secretary of the Commonwealth, and that the judgment of the court in that case rested upon a decision of those constitutional questions.

III.

Plaintiffs maintain that even if this court holds that the United States Supreme Court action in Langone v. Connolly is dispositive of their First and Fourteenth Amendment claims, they are still entitled to prevail, because the enforcement of the 15 percent rule violates Article 1, Section 4, Clause 1, Article I, Section 3, Clause 3, and the

Seventeenth Amendment of the Constitution.

We consider the claim based on Article I, Section 4, Clause 1. This clause provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing [sic] Senators.

According to plaintiffs, this provision mandates that the state legislatures alone may prescribe the conditions under which elections are held. Therefore, they declare that the imposition of any conditions on elections for the United States Senate by any entity other than the state legislature, such as the Democratic Party through the 15 percent rule, is an unlawful usurpation of the state legislature's constitutional prerogative.

This argument reaches too far. Plaintiffs' theory rests on the proposition that no power to impose restrictions on regular or primary elections may be delegated to political parties by the state legislature. Such an extreme interpretation, if adopted with respect to primary elections, could effectively destroy the ability of political parties to select members of their own choice - a right implicit in the freedom of association guaranteed by the First and Fourteenth Amendments of the Constitution. See Rodriguez v. Popular Democratic Party, 457 U.S. 1, 102 S.Ct. 2194, 72 L.Ed.2d 628 (1982); Democratic Party of the United States v. Wisconsin, 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981); Cousins v. Wigoda, 419 U.S. 477, 95 S.Ct. 541, 42 L.Ed.2d 595 (1975).

The potential for interference with the State Democratic Party's ability to

select the candidate of its members' choice is apparent from the statutory rules governing primary elections in Massachusetts. These rules provide that nomination papers for the primary ballot may be signed by 10,000 registered voters, whether or not they are enrolled party members, G.L. c. 53 § 46, and that both enrolled party members and unenrolled registered voters may vote in the primaries, as long as they enroll at the polls just before receiving ballots. G.L. c. 53, § 37. Thus, as was pointed out in Langone v. Secretary of the Commonwealth, 446 N.E.2d at 46:

> * * * if the only requirements for primary ballot access were the existing Massachusetts statutory requirements unaugmented by party rule, "a candidate for statewide election could be placed on the Democratic party ballot and win the primary, thus becoming entitled to be placed on the general election ballot as the Democratic party candidate, with little or no support from the regular party membership." Id. [Opinion of the Justices to the Governor.] 385 Mass. [1201] at

> 1205, 434 N.E.2d 960 [(1982)]. The justices concluded that this would substantially infringe the Democratic party's right of freedom of association, id. at 1206, 434 N.E.2d at 960, and the Commonwealth's interest in the integrity of the election process does not constitutionally justify elimination of party control over who the party's candidates in the general election will be.

In that case, the Supreme Judicial Court of Massachusetts construed G.L. c. 53 as "not to exclude, but rather to accommodate the 15 percent rule." 446 N.E.2d at 51.

Plaintiffs' interpretation of Article I, Section 4 also runs contrary to other decisions on the point, which have found it unobjectionable for state legislatures to delegate some of their regulatory authority over primary election balloting to state political parties. Skeen v. Hooper, 631 F.2d 707 (10th Cir. 1980); Tansley v. Grasso, 315 F.Supp. 513 (D.Conn. 1970); Clark v. Rose, 379 F.Supp. 73, 77 (S.D.N.Y. 1974).

Accordingly, we hold that the 15 percent rule represents merely a rule promulgated by authority which has been delegated by the state legislature, and is in no way violative of Article I, Section 4 of the Constitution.

IV.

Plaintiffs next argue that the application of the 15 percent rule transgresses Article I, Section 3, Clause 3 of the Constitution in that it unlawfully adds a qualification for the office of United States Senator beyond the age, citizenship and residency requirements of the Constitution.

As the defendants have correctly pointed out, the 15 percent rule does not add a qualification that precludes Hopfmann from obtaining the office of United States Senator. The rule merely adds a restriction on who may run in the Democratic party primary for statewide

political office and potentially become the party nominee. The cases cited by plaintiffs to the effect that neither Congress nor the states can add to the constitutional qualifications for office are inapposite. Cf. Powell v. McCormack, 395 U.S. 486, 547, 551, 89 S.Ct. 1944, 1977, 1979, 23 L.Ed.2d 491 (1969).

Unlike the additional requirements involved in the cases cited by plaintiffs, failure to comply with the 15 percent rule does not render a candidate ineligible for the office of United States Senator. An individual is free to run as the candidate of another party, as an independent, or as a write-in candidate. If he is elected and meets the requirements of Article I, Section 3, he will be qualified to take office. As the Wyoming Supreme Court stated in State v. Crane, 197 P.2d 864,

871 (Wyo. 1948), the test to determine whether or not the "restriction" amounts to a "qualification" within the meaning of Article I, Section 3, is whether the candidate "could be elected if his name were written in by a sufficient number of electors."

If plaintiffs' position were accepted, it would invalidate most of the state regulatory statutes, such as G.L. c. 53, which also restricts ballot access by requiring, among other things, that each candidate must submit nominating papers signed by at least 10,000 registered voters. Similar statutes have been upheld by the Supreme Court as an adjunct to the states' regulatory powers under the "time, place, and manner" clause of Article I, Section 4, in order to insure that "some sort of order, rather than chaos, is to accompany the democratic processes." Storer v. Brown, 415 U.S. 724, 730, 94

S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974); see also Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973).

We therefore conclude that the 15 percent rule cannot be said to violate Article I, Section 3, Clause 3.

V.

Plaintiffs' final contention is that the 15 percent rule violates the Seventeenth Amendment to the Constitution, which provides in pertinent part:

> The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

Plaintiffs insist that the 15 percent rule contravenes this provision because the rule applies only to candidates for statewide office, whereas the election of state representatives is not governed by the rule.

This contention was not raised below by plaintiffs, and is not properly before this court. See Johnson v. Allyn & Bacon, Inc., 731 F.2d 64, 73 (1st Cir. 1984); Johnston v. Holiday Inns, Inc., 595 F.2d 890, 894 (1st Cir. 1979).

However, if it is assumed arguendo that the contention is properly before us, we find that it is entirely lacking in merit. The 15 percent rule does not impose a qualification on voters for participation in elections for United States Senator which does not apply to voters in elections for representatives in the state legislature. As previously stated in this opinion, the 15 percent rule only imposes a restriction on those who wish to participate in the primary of the Democratic party and to obtain that party's nomination, whether they be candidates for the United States Senate or for the lower house of the state

legislature. We repeat that any individual who fails to meet the requirements of or is dissatisfied with the 15 percent rule has the opportunity to run as a candidate of another party, as an independent, or to conduct a write-in campaign. Forssenius v. Harmon, 235 F.Supp. 66 (E.D.Va. 1964), relied on by plaintiffs, is inapposite. In that case, the state statute provided that no voter would be entitled to vote in any federal election unless he offered proof of continuing residence by filing a certificate in the time and manner prescribed by the state law.

AFFIRMED.

# APPENDIX D

(__U.S.__, 105 S. Ct. 2106)

SUPREME COURT OF THE UNITED STATES

ALWIN E. HOPFMANN, ET AL. v.
MICHAEL JOSEPH CONNOLLY, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1440. Decided May 13, 1985

PER CURIAM.

Appeal from the United States Court of Appeals for the First Circuit is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, the petition is granted.

Hopfmann filed this action in the Federal District Court for the District of Massachusetts challenging a provision in the Charter of the Massachusetts Democratic Party. Among the theories he advanced was a claim that the provision, as enforced by Mass. Gen. Laws Ann. ch. 53, §§ 1-121 (1975 & 1985 Supp.),

violated the First and Fourteenth Amendments of the United States Constitution. Relying on Hicks v. Miranda, 422 U.S. 332, 344 (1974), the Court of Appeals held that the claim was foreclosed by this Court's summary disposition of two appeals from the Supreme Judicial Court of Massachusetts in Langone v. Connolly, 460 U.S. 1057 (1983). See 746 F.2d 97, 100-101 (CA1 1984).

In Hicks, the Court explained the precedential effect of the dismissal "for want of [a] substantial federal question" in Miller v. California, 418 U.S. 915 (1974):

> "[Miller] was an appeal from a decision by a state court upholding a state statute against federal constitutional attack. A federal constitutional issue was properly presented, it was within our appellate jurisdiction under 28 U.S.C. § 1257(2), and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction. We were not obligated

> to grant the case plenary consideration, and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one." 422 U.S., at 344-345.

Because the Court had jurisdiction over the appeal in Miller, the dismissal involved a rejection of "the specific challenges presented in the statement of jurisdiction." Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam).

On the other hand, the order disposing of the appeals in Langone read:

> "Appeals from Sup. Jud. Ct. Mass. dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari denied. Reported below: 388 Mass. 185, 446 N.E.2d 43 [1983]." 460 U.S., at 1057 (emphasis added).

Because the Court dismissed the appeals for lack of appellate jurisdiction, we had no occasion to adjudicate the merits of the constitutional questions presented in the jurisdictional

statements. Nor did the denial of certiorari have any precedential effect. See Maryland v. Baltimore Radio, Inc., 338 U.S. 912, 919 (1950) (Opinion of Frankfurter, J., respecting denial of the petition for certiorari).

The judgment of the Court of Appeals is vacated to the extent it relied on the dismissal of the appeals in Langone, and the cause is remanded for further proceedings.

It is so ordered.

# APPENDIX E

(769 F.2d 24)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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No. 84-1317

ALWIN E. HOPFMANN, ET AL.,

Plaintiffs, Appellants,

v.

MICHAEL JOSEPH CONNOLLY, ET AL.,

Defendants, Appellees.

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ON REMAND FROM THE
UNITED STATES SUPREME COURT

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Before
Campbell, Chief Judge,
Cowen,* Senior Circuit Judge,
and Bownes, Circuit Judge.

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Lawrence J. Ball and Laurence Elgin on brief for appellants.

Francis X. Bellotti, Attorney General and Alexander G. Gray, Jr., Assistant Attorney General, Chief, Elections Division, on brief for appellees, Michael Joseph Connolly, Secretary of State and Francis X. Bellotti, Attorney General.

James Roosevelt, Jr., James H. Wexler, Keith C. Long, and Herrick & Smith on brief for appellees, Chester G. Atkins and The Democratic State Committee of Massachusetts.

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July 31, 1985

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*Of the Federal Circuit, sitting by designation.

COWEN, Senior Circuit Judge.

In Hopfmann v. Connolly, ___ U.S. ___, 105 S.Ct. 2106 (1985), the United States Supreme Court vacated in part and remanded our decision, which is reported in 746 F.2d 97 (1st Cir. 1984). In that decision, we had held that the enforcement by the Commonwealth of Massachusetts of its Democratic Party's so-called "15 percent rule," which limits ballot access in the state primary to candidates who receive 15

percent or more of the vote in the party's convention, did not violate the United States Constitution. In rejecting one of appellants' contentions, that the rule violated the First and Fourteenth Amendments to the Constitution, we relied on the Supreme Court's summary dismissal of an earlier appeal from a decision of the Supreme Judicial Court of Massachusetts, Langone v. Connolly, 460 U.S. 1057 (1983). The Supreme Court vacated our decision to the extent that we relied on its summary dismissal in Langone, and held that this dismissal had no precedential effect.

Therefore, the sole question before us on remand is whether the enforcement by Massachusetts of its Democratic Party's 15 percent rule, which denied appellant Hopfmann access to the ballot in the 1982 Democratic primary for U.S. Senator, violated the First or

Fourteenth Amendments. Appellants contend that the state's enforcement of this rule violates their rights to freedom of association and equal protection guaranteed by these amendments. As we understand their brief, they do not maintain as the plaintiffs in the Langone case apparently argued before the Massachusetts courts, that Massachusetts statutes per se bar the state from enforcing the 15 percent rule.1/

Moreover, even if such a contention were before us, the Supreme Judicial Court of Massachusetts has construed the state's statutory ballot access requirements in Langone to encompass, rather

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1/ Appellants argue here that Massachusetts has not statutorily delegated its constitutional authority to conduct Senatorial elections to any political party. This argument was apparently made only as the basis for their contention, disposed of in our earlier decision, that the 15

than to exclude, the Democratic Party's 15 percent rule.

> For the purpose of evaluating the plaintiffs' claims that the 15% rule violated rights guaranteed to them by the Federal and State Constitutions, we treat the rule as though it were expressly contained in G.L. c. 53.

Langone v. Secretary of the Commonwealth, 388 Mass. 185, 195; 446 N.E.2d 43, 48 (1983). We are bound to follow this interpretation of state law by the state's highest court, absent extreme circumstances not present in this case. Mullaney v. Wilbur, 421 U.S. 684, 691 (1975).

A challenge to the validity of the 15 percent rule on First and Fourteenth

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(footnote continued)

> percent rule violates the "time, place, and manner" provisions of Article I, Section 4 of the Constitution. See 746 F.2d at 101-02.

Amendment grounds was also exhaustively refuted by the Supreme Judicial Court of Massachusetts in Langone, 446 N.E.2d at 48-51. Like the district court below, we agree with the analysis of this issue by the Massachusetts court, and do not consider it necessary to repeat that court's discussion at length. Both the rationale and the result reached in Langone are amply supported by the decisions of the United States Supreme Court, which are cited therein. It suffices to say that the 15 percent rule's infringement of appellants' rights to associate and express political ideas, as well as their right to equal protection of the laws, is not substantial. For example, the rule does not discriminate against any class of candidates or voters, and does not disqualify any candidates from appearing on the general election ballot. Cf.

Bullock v. Carter, 405 U.S. 134, 142-44 (1972); Jenness v. Fortson, 403 U.S. 431, 438-42 (1971). Moreover, the 15 percent rule promotes the legitimate and important state interest of "prevent[ing] the clogging of its election machinery, avoid[ing] voter confusion, and assur[ing] that the winner is the choice of a majority, or at least a large plurality, of those voting, * * *." Storer v. Brown, 415 U.S. 724, 732 (1974); Bullock v. Carter, 405 U.S. at 145.

Pursuant to the standards which have been utilized by the Supreme Court in ballot access cases, it becomes apparent that the 15 percent rule does not "unfairly or unnecessarily burden[] the availability of political opportunity." Anderson v. Celebreeze, 460 U.S. 780, 793 (1983). Therefore, we hold that appellants' contention that the 15

percent rule violates the First and Fourteenth Amendments is without merit.

The remand does not require and we find no reason for reviewing or disturbing the remainder of our previous decision. Accordingly, the judgment of the district court dismissing appellants' claims is again affirmed.

AFFIRMED.

# APPENDIX F

## ARTICLE 1

### § 3. The Senate; how constituted; impeachment trials

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments

until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall choose their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of the President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting

for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

## § 4. Election of Senators and Representatives

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

## AMENDMENT 1

Freedom of religion, speech and press; peaceful assemblage; petition of grievance

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## AMENDMENT 14

### § 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## AMENDMENT 17

Popular election of Senators

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

CHAPTER 52

§ 10. Rules and regulations

A state, city or town committee may make rules and regulations consistent with law, for its proceedings, and a state committee may make rules and regulations, consistent with law, for calling conventions.

Added by St. 1938, c. 346, § 1.

§ 2. Nominations; necessity; procedure

Except in the case of municipal nominations where a city charter or a law applying specially to a particular town otherwise provides, candidates of political parties for all elective offices, except presidential elector, shall be nominated and members of political committees, except as provided in sections one and four of chapter fifty-two, shall be elected, in primaries or caucuses, and the nomination of any party other than a political party, in any district containing more than one ward or town, shall be made by a convention of delegates chosen by causes held under section one hundred and seventeen in the wards and towns of the district for which the nomiantion is to be made. All nominations and elections in primaries

and caucuses shall be by direct plurality vote. No candidates shall be nominated, and no member of a political committee or convention delegate elected, in any other manner than is provided in this chapter or chapter fifty-two.

Amended by St.1975, c. 600, § 7.

§ 6. Nomination papers; number of signatures

Nominations of candidates for any offices to be filled at a state election may be made by nomination papers, stating the facts required by section eight and signed in the aggregate by not less than such number of voters as will equal two per cent of the entire vote cast for governor at the preceding biennial state election in the commonwealth at large or in the electoral district or division for which the officers are to be elected; provided, however, that in no event shall the number of signatures required be less than the number required of the candidate of a political party for the same office in the same electoral district or division to have his name placed on the primary ballot as provided for under section forty-four. If in any

electoral district or division the aggregate number of signatures required cannot be calculated due to changes in districts or in precinct or ward lines used in the first election after any redistricting, the aggregate number shall be twice the number required for the office under section forty-four. In the case of the offices of governor and lieutenant governor, only nomination papers containing the names and addresses of candidates for both offices shall be valid. Nominations of candidates for offices to be filled at a city or town election, except where city charters or general or special laws provide otherwise, may be made by like nomination papers, signed in the aggregate by not less than such number of voters as will equal one per cent of the entire vote cast for governor at the preceding biennial state election in the

electoral district or division for which the officers are to be elected, but in no event by less than twenty voters in the case of an office to be filled at a town election; provided, however, that no more than fifty signatures of voters shall be required on nomination papers for such town office. At a first election to be held in a newly established ward, the number of signatures of voters upon a nomination paper of a candidate who is to be voted for only in such ward shall be at least fifty.

No person may be nominated as an unenrolled candidate for any office to be filled at a state election, or a city or town election following a primary, if he has been enrolled as a member of a political party, as defined in section one of chapter fifty, during the ninety days prior to the last day for filing

nomination papers as provided in section ten.

Amended by St.1976, c. 234, § 1; St.1977, c. 546, § 3; St.1979, c. 745, § 1.

§ 9. Certificate of nomination and nomination papers; certification of candidate as registered voter; acceptance; statement of financial interest; filing

Certificates of nomination and nomination papers for state offices shall be filed with the state secretary and he shall forthwith issue to the candidate or other person filing the same a certificate acknowledging the time and date of the receipt thereof. Certificates of nomination or nomination papers for city and town offices shall be filed with the city or town clerk. Any candidate not required by section forty-eight of this chapter to file a certificate of party enrollment shall, on or before the last day provided by law for filing nomination papers, file a certificate from the registrars of voters of the city or town wherein such candidate is a registered voter,

certifying that such candidate is a registered voter in such city or town. Said registrars shall issue such a certificate forthwith upon request of any such candidate so registered or of his authorized representative. No nomination paper shall be received or be valid unless the written acceptance of the candidate thereby nominated shall be filed therewith. No nomination paper or certificate of nomination of a candidate for public office, as defined by chapter 268B, shall be accepted by the state secretary nor be valid unless accompanied by a receipt from the state ethics commission verifying the fact that a statement of financial interest has been filed pursuant to the provisions of said chapter 268B.

Amended by St.1976, c. 86; St.1978, c. 210, § 3.

§ 37. Party enrolment of voters

The voting lists used at primaries shall contain the party enrollment of the voters whose names appear thereon established as provided in this section, in section thirty-eight, and in section forty-four of chapter fifty-one. Except as provided by section thirty-seven A, a voter desiring to vote in a primary shall give his name, and, if requested, his residence, to one of the ballot clerks, who shall distinctly announce the same, and, if the party enrolment of such voter is shown the voting list, the name of the party in which he is enrolled. If the party enrolment of the voter is not shown on the voting list he shall be asked by the ballot clerk with which political party he desires to be enrolled, and the ballot clerk, upon reply, shall distinctly announce the

name of such political party and shall record the voter's selection upon the voting list. The ballot clerk shall then give the voter one ballot of the political party in which he is thus enrolled.

After marking his ballot the voter shall give his name, and, if requested, his residence, to the officer in charge of the voting list at the ballot box, who shall distinctly announce the same. If the party enrolment of the voter is shown on the voting list he shall also make announcement of such enrolment and the officer in charge of the ballot box shall, before the voter's ballot is deposited, ascertain that it is of the political party in which such voter is enrolled. If the enrolment of the voter is not shown on such voting list, the officer in charge of the ballot box shall announce the political party whose

ballot the voter is about to deposit, and the officer in charge of the voting list shall repeat the same distinctly and record the same upon such voting list.

The voting lists used at primaries shall be returned to the city or town clerk to be retained in his custody as long as he retains the ballots cast, whereupon such voting lists shall be transmitted to the registrars of voters for preservation for two years, after the expiration of which they may be destroyed. Said officers shall, at any time after the primary, upon receiving a written request therefor signed by any person, furnish a copy of said list to such person upon the payment of a reasonable fee or shall allow such person to examine and copy such list without charge under such supervision as the clerk may reasonably require. The

party enrolment of each voter, if any, shall be recorded in the current annual register of voters, and whenever a voter shall establish, cancel or change his enrolment it shall likewise be so recorded. In preparing the current annual register of voters, the party enrolment, if any, of each voter included therein, as shown by the register of voters for the preceding year, shall be transferred thereto. Upon receipt of a written request from a primary candidate or any officer of any ward, town or city committee or duly organized political committee for a copy of the party enrolment list of voters in any city or town, the board of registrars or the election commissioners, as the case may be, shall prepare said list and shall furnish at once the said list, free of charge, to the party requesting the same and they shall also furnish a

copy of said list to any person on payment of a reasonable fee, not to exceed the cost of printing such list.

Amended by St.1976, c. 310, § 2; St.1977, c. 829, § 7; St.1977, c. 879, § 3.

§ 38. Party designation of voters and eligibility to vote under party enrollments; certificate

No voter enrolled under this section or section thirty-seven shall be allowed to receive the ballot of any political party except that with which he is so enrolled; but, except as otherwise provided by said section thirty-seven, a voter may, except within a period beginning at ten o'clock in the evening of the twenty-eighth day prior to a state or presidential primary or the twentieth day prior to a special state primary or city or town primary and ending with the day of such primary, establish, change or cancel his enrolment by forwarding to the board of registrars of voters a certificate signed by such voter under the pains and penalties of perjury, requesting to have his enrolment established with a party,

changed to another party, or cancelled, or by appearing in person before a member of said board and requesting in writing that his enrolment be so established, changed or cancelled. The processing of an absentee ballot to be used at a primary shall also be deemed to establish the enrolment of a voter in a political party, effective as of the date of said processing. Except as otherwise provided in section twelve of chapter four, sections one and two of chapter fifty-two, sections twenty-six, forty A and forty-eight of this chapter, such enrollment, change or cancellation shall take effect forthwith following the receipt by said board of such certificate, or such appearance, as the case may be; provided, however, that no such enrollment, change or cancellation shall take effect for a state or presidential primary during the

twenty-eight days prior to that primary or for a special state primary or city or town primary during the twenty days prior to that primary. No voter enrolled as a member of one political party shall be allowed to receive the ballot of any other political party, upon a claim by him of erroneous enrolment, except upon a certificate of such error from the registrars, which shall be presented to the presiding officer of the primary and shall be attached to, and considered a party of the voting list and returned and preserved therewith; but the political party enrolment of a voter shall not preclude him from receiving at a city or town primary the ballot of any municipal party, though in no one primary shall he receive more than one party ballot.

At primaries the city or town clerk shall make available within the polling

place certificates to enable a voter to change his party enrollment, which shall be in substantially the following form:

Name_____
(Print)

Date_____

Address_____

I hereby request that my political party enrollment be changed as follows:

From:_____
(Name of party or Unenrolled)

To: _____
(Name of party or Unenrolled)

Signed under the pains and penalties of perjury.

_____
(Signature)

On the same day as he casts his ballot, the voter may transmit the certificate to the city or town clerk, who shall transmit them as soon as possible after the primary to the board of registrars, to be retained in their custody. The party enrolment of each voter shall be recorded in the current

annual register of voters, and whenever a voter shall establish, cancel or change his enrolment it shall likewise be so recorded.

Said board shall forthwith notify each voter transmitting any such certificate that the same has been received and that his enrolment has been established, changed or cancelled in accordance with his request or that said certificate is void and of no effect, if such be the case.

Amended by St.1977, c. 546, §§ 4, 5; St. 1979, c. 745, § 3.

§ 44. Nomination papers; number of signatures

The nomination of candidates for nomination at state primaries shall be by nomination papers. In the case of the governor, lieutenant-governor, attorney general and United States senator, nomination papers shall be signed in the aggregate by at least ten thousand voters; in the case of the state secretary, state treasurer and state auditor, they shall be signed by at least five thousand voters. Such papers for all other offices to be filed at a state election shall be signed by a number of voters as follows: for representative in congress, two thousand voters; for councillor, district attorney, clerk of courts, register of probate, register of deeds, county commissioner, sheriff and county treasurer, one thousand voters, except

that in Barnstable, Berkshire, Franklin, and Hampshire counties such papers for nomination to the office of clerk of courts, register of deeds, county commissioner, sheriff and county treasurer shall be signed by five hundred voters; for state senator, three hundred voters; for representative in the general court and commissioners to apportion Suffolk county, one hundred and fifty voters. If ten percent of the number of voters in the respective district who are enrolled in the party whose nomination the candidate seeks in a lesser number than the number otherwise required by the preceding sentence, then the number of voters required shall be such ten percent or shall be fifty percent of the number of voters otherwise required by the preceding sentence, whichever is greater. The total number of such

enrolled voters shall be determined from the records in the office of the state secretary. In Dukes and Nantucket counties such papers for nomination to all offices within the county to be filled at any state election shall be signed by twenty-five voters.

Amended by St.1976, c. 47; St.1977, c. 136; St.1981, c. 278, § 1.

§ 46. Nomination papers; submission to registrars; certification; correction of district; number of names

Every nomination paper of a candidate for a city or town office shall be submitted on or before five o'clock post meridian of the fourteenth day preceding the day on which it must be filed, to the registrars of the city or town in which the signers appear to be voters. Every nomination paper of a candidate for state office shall be submitted on or before five o'clock post meridian of the twenty-eight day preceding the day on which it must be filed with the state secretary to the registrars of the city or town in which the signers appear to be voters. Every nomination paper of a candidate for president at the presidential primaries shall be submitted to said registrars on or before five o'clock post meridian of

the fourteenth day before the final date for filing said papers with the state secretary and certification of said papers shall be completed no later than the seventh day before the final day for filing said papers with the state secretary. Nomination papers for candidates for state, ward, and town committees shall be submitted to said registrars on or before five o'clock post meridian on the eleventh day before the final day for filing with the state secretary and certification shall be completed no later than the fourth day before the final day for filing said papers with the state secretary. Each nomination paper shall be marked with the date and time it was submitted and such papers shall be certified in order of submission. Said registrars shall check each name to be certified by them on the nomination paper and shall

forthwith certify thereon the number of signatures so check which are names of voters both in the city or town and in the district for which the nomination is made, and who are not enrolled in any other party than that whose nomination the candidate seeks, and only names so checked shall be deemed to be names of qualified voters for the purpose of nomination. The registrars shall place next to each name not checked symbols indicating the reason that name was disqualified. The certification of voters shall be signed by a majority of the board of registrars.

The registrars shall inform the candidate submitting such papers if the designation of the district only in which he seeks office is incorrect, and shall give said candidate the opportunity to insert the correct designation on such papers before the

signatures are certified. The registrars shall, if the candidate so desires, allow a change of district on the nomination papers in the presence of the candidate whose name appears on the nomination papers, and the registrar and the candidate shall both initial the change of district so made and further shall in writing explain the change of district causing three copies to be made, on of each for the registrar and candidate and one to be attached to the nomination papers. If the correct district designation is not so inserted, the nomination papers shall not be approved. In no case may a correction be made to change the office for which such candidate is nominated.

The provisions of section seven relative to the number of names to be certified and received, and, except as otherwise provided in this section, the

provision relative to time of certification shall apply to such papers. For the purpose of certifying the names on primary nomination papers the registrars shall hold meetings on the fourth Tuesdays next preceding the seventh day before the final day on which such papers are required to be filed with the state secretary, except that for primaries before special elections the meetings shall be held on the two Tuesdays next preceding such date, and except that for presidential primaries, the meetings for certifying papers for candidates for state, ward, and town committees shall be held on the four Tuesdays next preceding the fourth day before the final day for filing said papers with the state secretary, except that the fifth Tuesday shall be substituted for that Tuesday on which any city or town holds its local election.

No person shall be candidate for nomination for more than one office; but this shall not apply to candidates for membership in political committees.

Amended by St.1975, c. 139, § 1; St.1975, c. 600, § 11; St.1977, c. 329, § 3; St.1977, c. 927, § 11; St.1980, c. 134, §§ 5, 6; St.1982, c. 283, § 2.

CHAPTER 53

§ 48. Nomination papers; time for, and acknowledgment of, filing; certificate to printing name on ballot

Nomination papers of candidates to be voted on at presidential primaries except candidates for state, ward and town committees, shall be filed with the state secretary on or before the first Friday in January preceding the day of the primaries.

Nomination papers of candidates for election to state, ward and town committees at presidential primaries shall be filed with the state secretary on or before the third Tuesday in November of the year preceding said presidential primaries.

All certificates of nomination and nomination papers of candidates for the office of state representative, state senator, executive council, or county office shall be filed with the state

secretary on or before the last Tuesday in May of the year in which a state election is to be held. Certificates of nomination or nomination papers for the office of senator in congress, representative in congress, governor, lieutenant governor, attorney general, treasurer and receiver general, state auditor and state secretary, shall be filed on or on1/ before the first Tuesday in June of the year in which a state election is to be held. In the case of primaries before special elections, such nomination papers shall be filed on or before the fifth Tuesday preceding the day of the primaries. The state secretary shall forthwith issue to the candidate or other person filing such nomination papers a certificate acknowledging the time and date of the receipt thereof.

1/ So in enrolled bill.

There shall not be printed on the ballot at the state primary the name of any person as a candidate for nomination for any office to be filled by all the voters of the commonwealth, or for representative in congress, governor's councillor, senator in the general court, representative in the general court, district attorney, clerk of court, register of probate and insolvency, register of deeds, county commissioner, sheriff, or county treasurer, unless a certificate from the registrars of voters of the city or town wherein such person has been a registered voter for more than ninety days and that he has been enrolled as a member of the political party whose nomination he seeks on or before the ninetieth day prior to the last day herein provided for filing nomination papers with the state secretary is filed

with the state secretary on or before such filing deadline. Said registrars shall issue such a certificate, signed by a majority thereof, forthwith upon request of any such candidate so enrolled or of his authorized representative. Said registrars of voters shall issue such certificate to any person seeking the nomination of a political party, who is a newly registered voter of that city or town enrolled in that political party and who has not been an enrolled member of another political party during the year preceding the last day for filing nomination papers with the state secretary. No such certificate shall be issued to any person who is a candidate for nomination for any such office, if such person has been an enrolled member of another political party during the year prior to the last day for filing

nomination papers with the state secretary as provided by this section.

There shall not be printed on the ballot at a city or town primary the name of any person as a candidate for nomination for any office to be filed at a city or town election unless such person has become an enrolled member of the political party whose nomination he seeks on or before the ninetieth day prior to the last day for submitting primary nomination papers to the registrars of voters prior to said primary.

The name of a candidate for election to any office who is nominated otherwise than by a political party, generally referred to as an "Unenrolled" candidate, shall not be printed on the ballot at a state election, or on the ballot at any city or town election following a city or town primary, unless

a certificate from the registrars of voters of the city or town wherein such person is a registered voter, certifying that he is not enrolled as a member of any political party, is filed with the state secretary or city or town clerk on or before the last day herein provided for filing nomination papers. Said registrars shall issue each certificate forthwith upon request of any such candidate who is not a member of a political party or his authorized representative. No such certificate shall be issued to any such candidate who shall have been an enrolled member of any political party ninety days prior to the last day for filing nomination papers as provided by this section.

Amended by St.1975, c. 139, § 2; St.1975, c. 600, § 12; st. 1976, c. 234, § 2; St. 1977, c. 546, §§ 7, 8; St.1977, c. 879, § 5; st.1977, c. 927, § 12A; St.1979, c. 745, § 4.

§ 116. Certification of results; summonses; certificates of election

The governor shall, in the presence of at least five councillors, certify to the results of the examination of the copies of the records of votes cast for governor and lieutenant governor, for councillors, for state secretary, state treasurer, state auditor and attorney general, and for senators and representatives in the general court, and shall issue his summons to such persons as appear to be chosen to said offices. The governor shall issue certificates of election to such persons as appear to be chosen to the offices of senator in congress, representative in congress, clerk of the courts, register of probate and insolvency, sheriff and district attorney, which shall be countersigned and transmitted by the

state secretary. No certification shall be made or summons or certificate issued under this section until after five o'clock in the afternoon of the fifteenth day following a state election or, in case a state-wide recount is held in accordance with section one hundred and thirty-five, until the tabulation and determination under the preceding section have been revised in accordance with the results of such recount.

Amended by St.1946, c. 130, § 3.

CHAPTER 54

§ 116A. Election of person not listed on state ballot; financial interest statement

Any person whose name does not appear on the state election ballot, but who receives sufficient votes to elect him to an office appearing on said ballot, shall within three days after the certification of his election file a statement of financial interest under chapter two hundred and sixty-eight B with the state ethics commission, if he has not already done so.

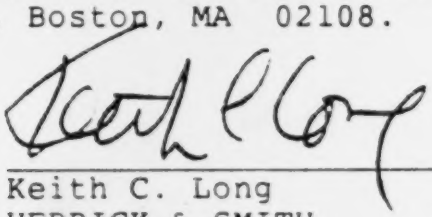
Added by St.1981, c. 386, § 13.

CERTIFICATE OF SERVICE
UNDER RULE 28

I, Keith C. Long, counsel of record for appellees Chester G. Atkins and The Democratic State Committee of Massachusetts, do hereby certify that I am a member of the bar of this Court, and that I have served three true and accurate copies of this Motion on each of the other parties to this appeal by delivery to their counsel of record in the following manner:

By Federal Express (overnight delivery), all charges prepaid, upon Laurence A. Elgin, Esq., 2762 Woodley Place, N.W., Washington, D.C. 20008 (counsel of record for appellants).

By First Class Mail, all charges prepaid, upon Thomas R. Kiley, Esq., First Assistant Attorney General, Office of the Attorney General, One Ashburton Place, Room 2001, Boston, MA 02108.



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Dated: January 24, 1986